(16,958.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 116.

RAVAUD K. HAWLEY AND RUSSELL A. ALGER, APPELLANTS,

vs.

L. EDGAR DILLER.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 2, 1900.

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1 In the United States Circuit Court for the District of Washington, Northern Division, Holding Terms at Seattle.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 357.

Bill of Complaint.

To the honorable judges of the circuit court of the United States for the district of Washington:

Now come the above-named plaintiffs, Ravaud K. Hawley and Russell A. Alger, by their solicitors, Jenner & Legg, and complaining of said defendant, L. Edgar Diller, for cause of complaint allege:

I.

That plaintiff, Ravaud K. Hawley, is now, and at all the times hereinafter mentioned was, a resident of the State of Ohio; that plaintiff, Russell A. Alger, is now, and at all the times hereinafter mentioned was, a resident of the State of Michigan; that said defendant L. Edgar Diller, is a resident of British Columbia.

2 II.

That prior to the 30th day of April, 1883, the N. W. ¼ of N. E. ¼ and N. ½ of N. W. ¼ of section 13, and the S. E. ¼ of the S. W. ¼ of section 12, all in township 36 north, of range 3 east, Willamette meridian, in the county of Skagit Territory (now State) of Washington, was surveyed public land of the United States of America, and was subject to entry and purchase under the act of Congress of June 3d, 1878; that said land was then and there of the class and character subject to entry and purchase under the timber-land laws of the United States.

III.

That on said 30th day of April, 1883, one Henry C. Hackley, he having theretofore complied with all the requirements contained in the laws of the United States regarding the entry of public lands and acquiring title to the same under said timber-land act, so as to enable him to pay for said above-described lands and claim a patent therefor from the United States, did on said day, at the United States land office, in Olympia, Washington Territory, purchase said lands from the United States, and he did then and there pay to the receiver of said land office the sum of four hundred dollars, in lawful money of the United States, that sum being the purchase price of said above-described lands, fixed by law; and upon
3 the payment of such sum as aforesaid, said receiver then and there made, executed, and delivered to said Henry C. Hackley a certificate or receipt therefor, which said receipt described the land so entered, stated the purchase price paid for said lands, the price per acre, and the law under which said entry was made; said

receipt or certificate was a receipt known as the final or duplicate receipt.

IV.

That thereafter said Henry C. Hackley, for a valuable consideration, sold, assigned, and transferred said receipt and certificate and all his right, title, and interest therein, and in and to said property, to Stephen S. Bailey, and that said Henry C. Hackley did then and there, in consideration of said sale, make, execute, and deliver to said Stephen S. Bailey, a good and sufficient deed of warranty, said deed granting and conveying said property to said grantee.

V.

That thereafter, on to wit, December 29th, 1887, said Stephen S. Bailey, and his wife, Jane Doe Bailey, for a valuable consideration, sold, assigned, and transferred all their right, title, and interest in and to all of said property above described to said plaintiffs, and did, in consideration of said sale, make, execute, and deliver to said plaintiffs a good and sufficient deed, said deed granting and conveying all the interest of said Stephen S. Bailey and Jane Doe Bailey, his wife, in and to all of said above-described property to said plaintiffs,
4 and said plaintiffs are now, and ever since said last-mentioned date, have been, the sole owners in fee in and to all of said above-described property, and entitled to the legal title in fee thereto.

VI.

That thereafter, to wit, on the 9th day of August, 1888, the Commissioner of the General Land Office suspended said entry of Henry C. Hackley, and held the same for cancellation, and ordered the register and receiver of said United States land office at Seattle, to notify said Henry C. Hackley and said transferees, said Stephen S. Bailey, Ravaud K. Hawley, and Russell A. Alger, of said action, and to notify them, said entryman and said transferees, that they would be allowed sixty days from the date of said notice, with ten days additional for mailing, within which to apply for a hearing to show cause why said entry should be sustained.

VII.

Said action was taken by said Commissioner of the General Land Office upon an alleged report of a special agent of said Land Department, which said special agent was then and there in the employ of, and under pay from the Government of the United States, and said action taken as aforesaid was not taken or founded upon the records of the land office, nor so pretended to be, nor anything contained in the proofs and proceedings of said entry of said
5 timber-land claim, nor because said lands in said entry embraced was not subject to sale at the price paid therefor by said entryman, said Henry C. Hackley, nor upon the complaint nor in the interest of any private citizen of the United States. Said timber-land entry was suspended by said Commissioner, as

aforesaid, upon alleged facts to substantiate or controvert which it was necessary to secure the attendance of witnesses, and the institution of proceedings, entirely new to the records of the case.

VIII.

That said action of said Commissioner of the General Land Office in suspending said claim as aforesaid, and in instituting a proceeding therefor, was entirely without authority of the laws of the United States of America, and was in exercise of power not conferred by said laws upon said Commissioner of the General Land Office, nor upon any other officer of the Land Department.

IX.

That said register and receiver did, on or about the 23rd day of August, 1888, issue and cause to be served upon said transferees, notice of said action of said Commissioner of the General Land Office, in accordance with his said instructions, which said notice stated in detail the fact of the entry, as aforesaid, that said special agent reported that he had made a personal examination of said tract, and
6 that the same was not chiefly valuable for its timber, and was valuable agricultural land, and also "The entry was made in the interest of Stephen S. Bailey *et al.*, and the land was conveyed to said Bailey by deed, dated April 30th, '83, the same day certificate was issued, consideration $596. On December 29th, '87, S. S. Bailey and wife conveyed the land to Russell A. Alger, of Detroit, Mich., and R. K. Hawley, of Cleveland, O.," etc., whereupon, and within sixty days from the date of said notice, said transferees, by their attorneys, made special appearance, and moved the dismissal of said proceeding, that said entry be reinstated, and that the same be passed to patent, upon the grounds that said action of said Commissioner was without authority of law, and in excess of the powers vested in said Commissioner, or in said Land Department, which said motion was by said Commissioner denied; that the denial of said motion by said Commissioner of the General Land Office was not the result of the consideration of any fact or facts, but was solely the result of said Commissioner's misconstruction, misinterpretation, and erroneous opinion of the law.

X.

That thereupon said transferees, by their said attorneys, applied for a hearing in accordance with the requirements contained in said notice by them received from said local land office, and said transferees by their said attorneys, thereafter stipulated with the attorney for the Government, that said case affecting said timber-land entry
7 be consolidated with eleven other entries owned by said transferees, and suspended at or about the same time, as hereinbefore mentioned by said Commissioner of the General Land Office.

Said application for hearing was granted by said Commissioner, and thereafter, to wit, commencing on or about the 27th day of

August, 1889, a pretended hearing was had in said local land office at Seattle, with the pretended and assumed title of the "United States *vs.* Stephen S. Bailey *et al.*," which said hearing occupied a period of more than three months. At all times during said pretended hearing, said transferees, by their said attorneys, objected to the taking of any testimony on behalf of said plaintiff, on the grounds, among others, that neither the Land Department nor any officer thereof, had jurisdiction to hear, try, or determine, said pretended cause, and that the institution and continuance of said pretended proceeding were contrary to law and against the laws of the United States, but said register and receiver of said land office, and subsequently said Commissioner of the General Land Office, and the honorable Secretary of the Interior, overruled said objection, and did take and consider pretended testimony on behalf of said pretended plaintiff, all of which was prejudicial to, and subversive of the rights of said transferees, and of these plaintiffs, and was contrary to the laws of the United States of America.

XI.

That after said pretended hearing, before said register and
8 receiver, of said Seattle land office, and after a pretended consideration of the so-called and pretended testimony taken as aforesaid, register of the said land office recommended that said entries involved in said contest be cancelled as to part of them, and the receiver of said land office recommended that all of said entries, including the timber-land entry of said Henry C. Hackley be sustained, that the suspension be removed, and the same be passed to patent. Under the rules of practice obtaining in said Land Department, all the papers in said pretended contest were forwarded to the Commissioner of the General Land Office, no appeal being necessary on account of the divided opinion of said register and receiver, under said rule. The Commissioner of the General Land Office, after hearing oral, as well as printed arguments, and after a full consideration of all the testimony submitted, found and decided that all of the lands embraced in said twelve entries, including said land entered by said Henry C. Hackley, was timber land and enterable as timber land under said act of June 3d, 1878, that all of the proceedings in relation to said timber-land entry were regular, that the proof submitted on said entry was sufficient, and that the Government had failed to prove that said entry was made in the interest of said Stephen S. Bailey, or any other person than said entryman, and ordered that said entry be removed from suspension and remain intact upon the records of the Land Department, and that United States patent issue therefor. Subsequently, and prior to the issuance of said patent, the honorable Secretary of the Interior ordered said Commissioner of the General Land Office to
9 certify all the papers and testimony in said cause and transmit the same to the office of said Secretary. Said order was made by the said Secretary of the Interior without any appeal being taken by the United States, and without notice to said transferees, or any of the defendants in said cause. Said Commis-

sioner of the General Land Office complied with the terms of said order and transmitted said papers and testimony to the office of the Secretary of the Interior, and said papers and testimony remained in said office of the Secretary of the Interior for a term of nearly three years without action of any kind being taken thereon, and until after the expiration of the term of office of the then Secretary of the Interior. Said decision of the Commissioner of the General Land Office rendered in said cause as aforesaid was at no time considered by the honorable Secretary of the Interior and the Attorney General of the United States acting as a board, nor otherwise, nor was the testimony and proceedings in said cause by them considered or acted upon, as a board, at all, nor did the Attorney General of the United States, at any time, consider or act upon said decision of the Commissioner of the General Land Office, or the pretended testimony, or the papers and documents in relation to said entry, at all, either as a member of a board or in his individual capacity.

XII.

That during the year 1893, the honorable Secretary of the Interior, Hoke Smith, pretended to consider said decision of the Commissioner of the General Land Office, the pretended testi-
10 mony taken as aforesaid in said cause, and under date of October 19th, 1893, rendered a pretended decision in said cause. In said pretended decision appeared a pretended finding of facts in relation to the allegation that the entry was made in the interest of Stephen S. Bailey *et al.*; said findings appear from said pretended decision to be based solely upon the pretended testimony of one pretended witness, one J. Theodore Lohr, and upon no other testimony whatever. Said pretended decision does not pretend to reverse the said decision of the Commissioner of the General Land Office, as to the character of the lands involved, and that they were enterable under said act of June 3d, 1878. Said pretended opinion, after stating the history of the cause, the fact of hearing held, et cetera, states:

"The register in quite a long opinion decided against the defendants on those two points, against the Government on the question of fraud in making said entries, and that part of the land was agricultural, specifying the tracts, and part of the character prescribed by the act of June 3d, 1878. The receiver held that the transferees were entitled to protection as *bona fide* purchasers, and that the entries should be passed to patent."

"You (meaning the Commissioner of the General Land Office) decided adversely to the defendants on the question of jurisdiction, did not specifically pass upon their claim for protection as innocent purchasers, held adversely to the Government as to the question of fraud, and as to the character of the land."

11 Here follows a discussion upon the question of jurisdiction of the department, and the right of transferees to protection as innocent purchasers, and a discussion of the testimony in regard to the character of the land, and said pretended discussion continues: "Taking all of the evidence in the case together, as to the character

of the lands in question, it may be true that the greater part of them might very properly be held to be subject to entry under the timber and stone act of June 3d, 1878 (20 Stat., 89);

"The paramount and controlling question in the case, applicable alike to all of these entries is: Were they made in good faith for the benefit of the respective entrymen, or, were they fraudulently made for, and in the interest of, another or others? The fraud charged in connection with these entries is that they were made at the instance and for the benefit of Stephen S. Bailey, and J. Theodore Lohr, to whom the lands were conveyed and sold, one tract before, and the others soon after, the entries were made.

"The Government offered no testimony-in-chief to support the allegations that said entries were made in the interest of said transferees, other than what might reasonably be inferred from the record, showing dates of said entries and transfers thereof;

"These entries were all transferred to said Stephen S. Bailey. On December 29, 1887, Bailey sold and conveyed by warranty
12 deed all of the land embraced in said entries to Russell A. Alger and Ravaud K. Hawley, the present claimants, for the price of $12 per acre; $5 in cash, and the balance to be paid when a patent should issue. There is no charge, nor is there any testimony affecting the transaction between Bailey and Alger and Hawley.

"The first witness for the transferees, J. Theodore Lohr, testified, on cross-examination, that, prior to coming to Washington in 1882, he had been employed in 'locating people on Government lands, and buying and selling timber lands and farming lands;' that he had dealt more in timber than agricultural land, and usually received $50 for each claim located; that he had located between 50 and 60 persons in Washington Territory since he went into said business (Ev., p. 808); that Henry McBride, Chalcraft, Henry E. Brandon, Crone, Holcomb, and Hackley claims were located by him; that he gave Gilmore description of his claim; also the Leslie claim (Ev., 809); that he did not give description of the Rogers claim, but thinks he gave descriptions of the Stanley and Wilson claims. Lohr also testified that, in the winter of 1882 and spring and summer of 1883, his headquarters were in Seattle, and that the first part of the time he boarded at the New England hotel, of which said Bailey was proprietor; that he located said parties in 1882, and, at the time some of the locations were made, was personally acquainted with said Bailey; that his acquaintance with Mr. Bailey was 'after most of these entries were located;' that he knew Bailey on January 1, 1883, and located McBride some time in
13 1883, but does not remember what part of the year; that he first knew McBride in 1882 at Laconner; that he was known as a land locator, and gave McBride description, and was afterward requested by him to show him over the claim some time in summer of 1883; that he told McBride he would charge him $50 or $100 for locating his entry; that he located McBride in one day; that, after coming back from examining the claim, witness bought said claim, but does not remember when the entryman made his final proof;

that he does not remember being in Olympia on or about June 22, 1883, and does not know who paid the money for the McBride entry; that witness frequently went to the land office, and parties sent their money by him to pay for their claims after having made final proof, but does not remember taking any money for the McBride entry (Record, p. 814). Lohr also swears that the money to pay for the McBride entry was not given to him by S. S. Bailey (Record, p. 815); that, when he got the duplicate receipt for parties, he turned them over to them; that he had no understanding with McBride in the month of June, 1883, relative to the purchase of his entry, other than what he had with all parties whom he located; that he agreed to buy any claim located by him after the entryman had obtained title if he wanted to sell, and would pay more than any one else (Record, p. 1816); that he could do this because it would save an examination of the claim, and agreed usually to give $50 more than any one else would give, which promise was given 'as an inducement for the parties to take my (his) word and
14 knowledge as being good as to the quality and quantity of timber' (Record, p. 817); that nothing was said about paying the expenses of locating and examining the land or the land-office fees outside of the purchase price; that the agreement with McBride for his claim was made on July 23, 1883, and not before (Record, p. 821); that he sold the McBride claim to S. S. Bailey in the fall or summer of 1883.

"Lohr further swears that he had an agreement with said Bailey, in the spring of 1883, to the effect that he would invest in lands where witness thought there was a good bargain; that Bailey would furnish the money to buy the land, provided he, Lohr, would attend to the buying and selling, and the profits growing out of the sale should be shared between them (Record, p. 824); that said agreement was verbal only, and Mr. Bailey carried out his part thereof; that witness did not locate these entries in pursuance of this agreement; that he does not remember ever having loaned any of these entrymen any money, but is probable that he did; that he remembers having made an affidavit in June, 1888, before Special Agent Carson, relative to said entries, but cannot say just what it contained (Record, p. 826); that when he carried money to entrymen he sometimes took notes, and sometimes trusted to their honor; that no note that witness ever received 'shows anything else but the amount of money he received' (Record, p. 826).

"Witness further swears that he was more or less acquainted with the other entrymen in 1883, some only by sight; that
15 John Brandon was employed in the New England hotel, and some of the others were stopping there.

"On redirect examination, Lohr testified that in 1882 and 1883 timber lands were most sought after in Washington (Record, p. 850); that there was no agreement of contract with any of said entrymen, or between the entryman and any other party, so far as witness knows; 'that after the said final entry the party would sell to "witness" at any specified price, or at all;' that Wayne W. Holcomb is an attorney-at-law, and has been representative to the legislature

from Yakima county, in said State; that said Chalcraft was a civil engineer in Seattle, Gilmore was a merchant at Edison, Skagit county, in said State, McBride was a school teacher, and now an attorney-at-law, all men of good character (Record, p. 853); that McBride asked witness to give him a location as a timber claim, and he did so.

"On recross-examination, Lohr said he was not asked as to the legal requirements, and took it for granted that McBride knew that he 'should not make his entry for the benefit of any other person but himself' (Record, p. 855); that Henry Brandon was engaged in driving a delivery wagon for Schwabacher Bros., of Seattle, and is a brother of John E. Brandon, and does not know as to his means (Record, p. 857); that he was an honorable, trustworthy young man; that Edward Crone was an assistant surveyor, and might have been employed in the New England hotel in the summer of 1883; that said Wilson was engaged in a restaurant in
16 Seattle; that said Hackley assisted in surveying, and was afterwards a contractor on a road near Lake Washington; that said Rogers was a farmer at Edison; and said Leslie worked in a barrel factory in North Seattle (Record, p. 858).

"In examination of the Gilmore entry, on cross-examination, witness said that he bought provisions from Gilmore, and advised him, the same as he would any other friend, to use his timber rights and secure timber lands, as they would be very valuable in the future; told him between April 23 and April 30, 1883, that he could sell his claim to S. S. Bailey, and conducted the negotiations for the purchase of the land for Mr. Bailey (Record, p. 872); that Gilmore said that he was the owner of the Stanley and Rogers claims, and if he sold one must sell all, or words to that effect; that witness remembers that Mr. Bailey told him about a year ago that the United States claimed that Gilmore sold to him before he purchased from the Government, and that Mr. Gilmore was willing to rectify by giving another deed (Record, p. 875).

"Witness further swears that he had no interest in the lands deeded by Gilmore to Bailey (Record, p. 876); that his interest was not in the land, but in the profits after the lands were sold (Record, p. 878).

"In the redirect examination on the Chalcraft entry witness swears that there was no contract between said entryman and him or with any other person so far as he knows, 'for the pur-
17 chase or sale of the land embraced in his timber entry and prior to the receipt by him by the land-office receipt for the land' (Record, p. 903).

"Lohr further swears that he made H. Brandon the same offer as to others relative to the purchase of his claim, after procuring title (Record, p. 907).

"In reference to the Crone entry, witness states that he might have loaned the entryman money to pay for his entry, but was not with any understanding that witness was to become the purchaser after final proof; that this was done as an accommodation, and the land was sold to Bailey in the spring of 1883 (Record, p. 920).

"Witness conducted the negotiations for the sale of the Stanley and Rogers entries from Gilmore to Bailey, until the price was agreed upon (Record, p. 930), and did the same with the Holcomb entry (Record, p. 938).

"On cross-examination, relative to the Wilson entry, Lohr testified that the entryman was working in a restaurant, as waiter or bartender, owned by Anderson & Ford, and the witness conducted the negotiations for the sale of his land to Bailey, but does not remember whether he loaned Wilson the money to pay for his entry or not (Record, p. 946).

"Witness also conducted the negotiations for the purchase of Hackley's entry, but made no agreement prior to April 30, 1883, the date of his entry (Ev., 954). Witness also said on cross-examination that John E. Brandon was employed as a porter at the
18 New England hotel, and was also engaged in working at surveying; that witness concluded the negotiations for the sale of his entry to Mr. Bailey for $605.50 (Ev., 605). Witness also swears that he located the Leslie entry, was slightly acquainted with Leslie in 1883, and received from him the sum — $50 for service in locating (Ev., 989); that he negotiated for the sale of said entry to Bailey for the sum of $573; that he does not remember when Leslie made his final proof, and the negotiations were doubtless on the day of the sale (Ev., 992).

"After testifying as to each smallest legal subdivision of said entries, witness was further questioned in general, and stated that in the years 1882 and 1883 there were no settlers or settlements in townships 36 and 37 north, range 3 and 4 east, and no improvements in the way of wagon roads or railroads (Ev., 996); that he received no compensation from said entrymen for sale of their land, and none was promised him by them (Ev., 1001); that each entryman was at liberty to sell to any one after the completion of his entry (Ev., 1003).

"On general cross-examination witness was handed an affidavit purporting to have been made by him in June, 1888, relative to his transactions with said Bailey, and he admitted that he signed the same, and that the substance was correct (Ev., 1005).

"When his attention was called to the statement in said affidavit that 'some of these men gave me a note for the $50 that I
19 was to receive for locating them, and in those cases the notes specified that in case they desired to sell the land after making final proof, that I would surrender them the notes, or that they were to be null and void in case I bought their lands,' and he was asked why he had testified that the notes contained no stipulations relating to the disposition of said lands, he answered that the affidavit was drawn up in a hurry, and was signed by him without proper perusal; that he did not understand in his conversation that these stipulations were mentioned in the note taken by him; that his "impression was that they were verbal considerations, or verbal understandings, as a matter of showing my (his) good faith in what I had stated to them.'

"After re-reading the affidavit, I find that these are supposed to have

been included in the note as a part of the writing, which I do not remember of as being facts. (Ev., 1006–'7.)

"He also states that Mr. Bailey asked him to testify in this case, and agreed to pay all of his expenses. (Ev., 1008.)

"Witness was asked the following questions: Did it occur to you when you were locating these entrymen, and subsequently buying up their claims, for the mutual benefit of S. S. Bailey and yourself that you were operating in direct violation of the spirit of the timber law? and he answered: 'I did not believe that I was violating any law more than I would by locations made by other parties, so long as I used due diligence in making purchases when parties had the right to sell according to the advice given me.' (Ev., 1010.)

"Witness also said that he had been paid by Mr. Bailey his full share in the profits arising from the sale to Hawley and Alger, and had no interest in the result of the trial. (Ev., 1012.)

"On redirect examination, Lohr states that the special agent wrote said affidavit, and he only 'skimmed over the first part of it, but took it for granted it was representing what was understood by the conversation at that time;' that there was evidently a misunderstanding on the part of the special agent as to what he said about the contents of the note given him by persons whom he located.

"In addition to these facts and circumstances it must be remembered that Agent Carson had reported these entries as fraudulent; that none of the entrymen were called as witnesses for the transferees, nor was Bailey sworn or offered as a witness in his own behalf.

"I have thus stated in detail, and at unusual length, the evidence relating to the alleged fraudulent character of these entries in the transactions between Bailey and the entryman, for the purpose of making clear the ground upon which my conclusion is based. At every point Mr. Bailey appears, the conveyances were made to him very shortly after the entries were made; he advanced the money to make the entries in most, if not all the cases; he was a hotel-keeper; Lohr was to select the lands, find the persons to make the entries, locate them thereon, and Bailey was to pay the expenses; upon the purchase of the land Bailey was to receive a deed for the tract, and Lohr and Bailey were to divide the profits between them. Lohr says this is so in his affidavit, although it is true he seeks to avoid it when he is put on the witness stand.

"All the circumstances satisfy my mind that this was the arrangement. Lohr picks up clerks, bar-tenders, grocerymen, school teachers, lawyers, in a word anybody who was willing to make the location or be concerned in it, for a consideration.

"They were mostly young men without any permanent abiding place.

"It is very strange, indeed, if they entered that land for their exclusive use and benefit, that they should have conveyed it to Mr. Bailey on the same day that the entries were made, or within a day or two thereafter, when the evidence shows that he was engineering

these entries from the time the parties made the first affidavit until they submitted their final proof in support of their entries.

"It is very plain in my mind that this was a scheme put up in the first instance by Lohr and Bailey for the purpose of acquiring title to the land for speculative purposes. To my mind this raises an impassable barrier, if the law is to be observed, to the sustaining of these entries.

22 "The purpose and intent of the act was to give every citizen of the United States, or one who has declared his intention to become such, the opportunity to purchase one hundred and sixty acres of land under said act, if it was unfit for cultivation, but in every case the entryman is required to act in good faith.

"But none of the entrymen at the time they made these purchases did so in good faith in harmony with the spirit and letter of the law.

"This holding in nowise conflicts or interferes with the right of a purchaser in good faith of land under the act, after he acquires title, to sell the land if he desires so to do. Sales made soon after purchase however, if unexplained, have a tendency to arouse suspicion in the mind that when the entry was made, it was not made for the entryman's own exclusive benefit and use. And when we find twelve entries made in the manner in which these were made, money furnished by the assignee, engineered by the assignee, deeded to the assignee, and this arrangement made prior to the time the locations were made, I do not see any escape from the conclusion that they were made in violation of the statute, and ought not to stand.

"These views do not in any manner conflict with any of the doctrines announced by the Supreme Court in the case of United States *v.* Budd (144 U. S., 154). In that case patent was issued; the Government was undertaking to set aside the patent on the ground of fraud, and the court lays down the rule that after the issuance of patent the Government must make a much stronger case in

23 the order to cancel an entry than before patent; that prior to the issuance of patent the matter is in the hands of the Land Department and its findings on questions of fact are generally conclusive.

"The court says: But, after all, the question is not so much one of law for the courts after the issue of patent, as of fact, in the first instance for the determination of the land officers.

"The courts do not reserve their determination upon mere questions of fact. In the absence of fraud or some other element to invoke the jurisdiction and powers of a court of equity, the determination of the land officers as to the fact whether the given tract is or is not fit for cultivation is conclusive.

"In that case there was the testimony of two witnesses denying the charge that Budd had made a prior agreement with Montgomery, that is, Budd and Montgomery each filed sworn answers denying specifically the existence of any such prior agreement; and an answer under oath in an equity case, when called for, as it was in that case, is always to be taken as evidence.

"Moreover, in that case the court eliminated from the record all the testimony going to show that the purchaser from Budd had made similar purchases in collusion with other entrymen at the same time and in the same vicinity, which left the Government with practically no evidence showing fraud.

24 "In the case at bar, by stipulation, all these cases were to be tried as one, and the testimony touching all these transactions was through this agreement admissible and admitted in the trial of this case.

"It is charged, among other things, that these entries were made on speculation and not in good faith by the several entrymen, for the purpose of appropriating to their own use and benefit, and yet the purchaser failed at the trial to testify himself, or to introduce any of the entrymen from whom he purchased.

"It cannot be said in this case, as in the case of Budd, that the Government had the right to cross-examine the transferee or the entrymen, because none of them were produced as witnesses at the trial, and there was no power on the part of the Government to compel their attendance. Their testimony could only be obtained by their voluntary appearance and offering themselves as witnesses, which no man is willing to do when his testimony, truthfully given, will show that he has obtained valuable property in violation of law. The case of Budd was tried in court, where these unwilling witnesses could be compelled to appear and give their testimony.

"It is true that since the case has been pending here, and very recently, Bailey has offered to testify therein, and submit himself to cross-examination. His affidavit, as to what his evidence would be, accompanying this offer, shows that he is prepared to make a denial of any wrongful act in connection with said entries.

25 An affidavit to the same effect, sworn to on June 18th, 1891, was already in the record, and therefore the offer was declined. Considering this denial, and giving to it the utmost force and effect, it utterly fails to meet and overcome the preponderating adverse evidence in the record.

"Whilst this tardy offer of Bailey, to some extent, may modify the just criticism made because of his failure to testify in the case at all, the fact remains that the evidence of the entryman is entirely wanting.

"The Government cannot *to* be charged with laches in not having their testimony in the record. It cannot, therefore, be said, as in the case in the Supreme Court:

"If the Government, the complaining party, failed to call them, it is to be presumed that, upon inquiry, it found that they knew nothing that would tend to substantiate its claim.

"On the other hand, if these men made their entries for their own use, and not on speculation or in collusion with Bailey, there was every inducement on his part to call them, and every moral obligation on their part to respond. They were peculiarly his witnesses; their testimony, in connection with his own, could alone overcome the damaging disclosures of Lohr, and, if they were men of good character, as claimed by him, so much the more effective

would their testimony have been to show a lack of interest or collusion on his part.

"The conduct of the party in omitting to produce that
26 evidence in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumption against him, since it raises strong suspicions that such evidence, if adduced, would operate to his prejudice.

Starkie on Evidence, vol. 1, p. 54.

"There is another clear distinction between the inquiry herein for consideration and the matter at issue in the case of The United States *v.* Budd. In that case the patent to Budd was sought to be set aside because of an alleged conspiracy between Budd, the entryman, and Montgomery, the purchaser. That is to say, the only matter considered by the court in that case, aside from the character of the land, was, whether the entry of Budd was made in collusion with or in the interest of Montgomery.

"In the language of Justice Brewer, who delivered the opinion of the court:

"The particular charge is that Budd, before his application, had unlawfully and fraudulently made an agreement with his codefendant, Montgomery, by which the title he was to acquire from the United States should inure to the benefit of such codefendant.

"The question as to whether Budd's entry was made in good faith to appropriate it to his own use and benefit, and not on
27 speculation, appears not to have been in issue, further than the inquiry would necessarily be raised by an investigation confined to Montgomery's connection with the alleged fraudulent entry.

"To entitle one to make a timber-land entry and purchase he is required to make oath: First, that he does not apply to purchase on a speculation, but in good faith to appropriate the timber to his exclusive use and profit, and, second, that he has not directly or indirectly made any agreement or contract, in any way or manner, with any person or persons, by which the title which he might acquire from the United States should inure in whole or in part to the benefit of any person except himself.

"These requirements of the oath are separate and distinct; the entryman could comply with the one, and violate the other, and a violation of either requirement would defeat the entry. For instance, if a person should make an entry, for the purpose of speculation, although he might not offer to sell until after he should receive his final certificate of purchase, yet his entry should be forfeited; and, if a person should make entry in good faith and with no speculative purposes or intention whatever, but if, before receiving final certificate he should make an agreement or contract to sell, his entry should be forfeited.

"The Supreme Court in the case of The United States *v.* Budd, dealt mainly with one of these requirements of the oath of the en-

tryman, to wit: that the entryman had not sold or agreed to sell the land entered by him in violation of the statute.

28 "The other requirement of the oath referred to, that the entryman had not applied to purchase on a speculation, was considered by the court only as it threw light on the main and only real question in that case, to wit: whether a contract or agreement to sell had been made by the entryman that would work a forfeiture of his right to purchase. As a distinct question, affecting the right of the entryman to purchase, the court did not consider the question here made, that the entry originally was for a speculative purpose, whether he had or not made a contract for the sale of the land to another.

"It is clear, therefore, that the case of United States *v.* Budd does not decide the question now under consideration.

"Now, if it should be conceded in the cases before me that the testimony of Lohr is insufficient to show that these several entries were made in the interest of, or in collusion with, Bailey, it seems to me the conclusion cannot be avoided that they were made on speculation, and not in good faith, to appropriate the land thus entered to the exclusive use and benefit of the several entrymen.

"Lohr shows by his testimony that these several entrymen were engaged in different pursuits, and were induced by him to make these purchases, he telling them that he would buy their claims and give them $50 more than any one else would, that this promise was made to the parties as an inducement to take his word and knowledge as to the quality and quantity of the timber, and that

29 while he does not remember loaning any of these entrymen money, yet it is probable he did; that when he did so he sometimes took notes and sometimes trusted to their honor.

"By this and other similar testimony he leaves no doubt in my mind that he procured these entries to be made purely on speculation; that none of these entries were made for the purpose of appropriating the land or timber to the use of the entrymen, but on the promise or representations of Lohr that such acts on their part would result in a profitable speculation—that is, they would be able to make an immediate sale of the land at a price greatly in excess of the cost to the entryman.

"Entries made in this way and for this purpose are in violation of the spirit and letter of the law; for the applicant to purchase is required to make affidavit that 'he does not apply to purchase the same on speculation.'

"This interpretation of the statute does not imply that a timber-land entryman is not authorized to sell his entry at any time that he may choose after he has made his proof and received his certificate; but when, as in these cases, it is clearly shown that prior to taking any steps to secure the land, they had first satisfied themselves that these entries could be sold at a profit, and thereupon they made their entries for the sole purpose of securing the profits thus in view, to my mind they bring themselves within the inhibition of the statute.

"Can it be doubted from all the record in this case that these entries were so made? I think not.

30 "Mr. Bailey's connection with these purchases may be eliminated from the case, and the acts and motives of the entrymen alone considered, and their entries cannot be sustained if any meaning is to be given to that part of the statute which forbids the making of such entries on speculation.

"I am aware that in the case of The United States *v.* Budd the court used language indicating that nothing short of an actual prior agreement to sell can disturb the entry.

"But it must be remembered that in case a 'prior agreement to sell' was the sole — of fraud on trial, and when Justice Brewer announced that 'all it (the law) denounces is a prior agreement, etc.,' the language must be considered with reference to the matter at issue—namely: whether there was such an agreement between Budd and Montgomery.

"Here the Government is inquiring into all matters connected with these entries, and is not limited, as in that case, to the issue made by the pleadings.

"The decision of your office (meaning the Commissioner of the General Land Office) sustaining these entries are reversed, and you are directed to cause said entries to be cancelled."

The honorable Secretary of the Interior made the above and foregoing findings of fact and decision, as a result of his misin-

31 terpretation and misconstruction of the law, and his said misconstruction and misinterpretation of the law consisted in this:

First. The said Secretary of the Interior erred in law in finding and holding that the pretended testimony submitted was sufficient to establish fraud.

Second. The said Secretary of the Interior erred in law in deducing said pretended facts from said pretended testimony.

Third. Said Secretary of the Interior erred in holding that said pretended facts deduced from said pretended testimony, established fraud;

Fourth. Said Secretary of the Interior erred in law in deciding that an entryman under the act of June 3rd, 1878, violated said law by contracting to sell, or selling his claim prior to the issuance of the final certificate;

Fifth. Said Secretary of the Interior erred in law in considering the question whether said entrymen, or any of them, entered said land on speculation;

Sixth. Said Secretary of the Interior erred in law in considering any question not in issue, nor within the charges preferred by the Government, and brought to the notice of defendants;

Seventh. Said Secretary of the Interior erred in law in deciding that plaintiffs herein were not entitled to protection as innocent purchasers;

32 Eighth. Said Secretary of the Interior erred in law in assuming the right to review said decision of the Commissioner

of the General Land Office and in passing upon and considering the record in said cause;

Ninth. The said Secretary of the Interior erred in law in ordering the cancellation of said entries, including said entry of said Henry C. Hackley.

XIII.

That thereupon said Commissioner of the General Land Office and upon, to wit, November 21, 1893, ordered the cancellation of said timber-land entry of Henry C. Hackley upon the records of said Land Department, and the said entry was then pretended to be canceled thereon, and said tract of land was then falsely pretended to be subject to entry as public land of the United States.

XIV.

Said taking of the so-called and pretended testimony in said pretended action, the pretended consideration thereof by said register and receiver, by the said Commissioner of the General Land Office, and by said Secretary of the Interior, the said order for the said cancellation of said timber entry upon said records of said Land Department, the said pretended cancellation thereof upon said records, and the declaration that the land embraced therein was thereafter
subject to entry as part of the public domain of the United
33 States, were all the result of misconstruction, misinterpretation and mistake of the meaning of the laws of the United States.

XV.

That the purchase price of said tract of land paid by said Henry C. Hackley as aforesaid, was covered into the Treasury of the United States, and the United States has at no time repaid nor tendered repayment of the same nor any part thereof, and still retains all of the same.

XVI.

That by reason of the entry and payment of the purchase price therefor, according to law, as aforesaid, and by virtue of the conveyance above mentioned, these plaintiffs became and are entitled to the legal title to all of said above-described lands, and that these plaintiffs did frequently demand of the Commissioner of the General Land Office and of the honorable Secretary of the Interior that patent be issued for said entry in the name of said entryman according to law, but said officers of the Land Department wholly disregarded the rights of these plaintiffs, and, in derogation of plaintiffs' rights, did, at the time and in the manner aforesaid, order the register and receiver of the United States land office at Seattle to cancel said timber-land entry of Henry C. Hackley upon the records of their office, and to permit entries to be made thereof by parties other than said entryman, Henry C. Hackley.

34 XVII.

That said register and receiver of said land office obeyed the instructions of said Commissioner of the General Land Office, and pretended and attempted to cancel said entry, and pretended thereafter that said above-described lands were a part of the public domain of the United States, and subject to entry and purchase under the laws of the United States for the disposal and sale of its public lands.

XVIII.

That said acts by said officers of the Land Department were done against the earnest protest of plaintiff-, and that the same were entirely without authority of law and against the law, and subversive of the rights of plaintiffs. That all of said acts of said Commissioner of the General Land Office and of the register and receiver of said local land office were done under the sanction of the honorable Secretary of the Interior, and that said sanction was made and given without plaintiffs' consent.

XIX.

That on the — of ——, A. D. 1895, one L. Edgar Diller, said defendant, offered and was permitted by said register and receiver to make, and did make, entry of said tract of land, as a pretended purchaser thereof under said act of June 3, 1878, and, in
35 pursuance of said pretended entry and purchase, and of payments made in accordance therewith, the said land was pretended to be granted, and was patented to him, the said L. Edgar Diller, as said pretended purchaser, by a patent issued to him therefor by the United States, bearing date Oct. 15, 1895.

XX.

That the pretended title of said defendant, L. Edgar Diller, to the said tract of land casts a cloud upon the title of plaintiffs to said tract of land, which cloud should be removed.

XXI.

That said patent was wrongfully issued, without authority of law, and in attempted subversion of the rights of plaintiffs and their grantor in the premises, and that the defendant should be decreed to hold in trust for plaintiffs, and to convey such title as in him may appear to these plaintiffs.

XXII.

That the value of said above-described property, patented as aforesaid, exceeds in value the sum of two thousand dollars, and does not exceed in value the sum of ten thousand dollars.

XXIII.

That plaintiffs have no plain, speedy, or adequate remedy
36 at law, and can only obtain relief in a court of equity where such matters are properly cognizable.

To the end, therefore, that the said L. Edgar Diller, to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated and he distinctly interrogated thereto, and that the pretended title of said defendant to the land so claimed by him, under said patent as aforesaid, may be decreed to be a cloud upon the title of these plaintiffs to the lands described in said patent, and that said cloud be removed by the decree of this honorable court in this cause, and that said defendant, according as his claim of title may be made to appear herein to said lands patented as aforesaid, may be decreed to hold said patent and whatsoever of title may have accrued to said defendant under or through said patent, in trust for the use and benefit of plaintiffs, and that said defendant may be decreed to convey to plaintiffs whatsoever of title he may have obtained or acquired under and by virtue of said patent, and that the title of plaintiffs to the land in said patent described may be forever quieted against said defendant, claiming title thereto as aforesaid, and that plaintiffs may have such further and other relief in the premises as may be equitable and to your honors shall seem meet and equitable, may it please your honors to grant unto plaintiffs a writ of subpœna to be directed to said defendant thereby commanding him, at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court, and then and there, full, true, direct,
37 and perfect answer make to all and singular the premises, and further to stand to, perform, and abide by such further order, direction, and decree therein as to your honors shall seem meet, and plaintiffs, as in duty bound, will ever pray, etc.

JENNER & LEGG,
Solicitors for Plaintiffs, Rooms 406, '7, '8, *Seattle Nat. Bk. Bldg., Seattle, King Co., Wash.*

UNITED STATES OF AMERICA, } ss:
District of Washington, }

Chas. K. Jenner, being first duly sworn, on oath says: That he is one of the solicitors for plaintiffs in the above-entitled action; that he has heard the foregoing complaint read, knows the contents thereof, and believed the same to be true; that he makes this affidavit because neither of said plaintiffs is within this district or State; that affiant is well acquainted with the facts therein set forth; and that he knows them to be true, except as to the matters therein stated on information or belief, and, as to these, he believes them also to be true.

—— ——.

Subscribed and sworn to before me this — day of ——, 189–.

——— ———,

Notary Public in and for Washington, Residing at —.

(Endorsed:) Bill of complaint. Filed Feb. 21, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

38 United States Circuit Court for the District of Washington.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Præcipe for Appearance.

To the clerk of the above-entitled court:

You will please enter our appearance as solicitors for plaintiffs in the above-entitled cause.

JENNER & LEGG,
Rooms 406, '7, and '8, Seattle Nat. Bank Bldg., Seattle, Wash.

(Endorsed:) Præcipe for appearance. Filed Feb. 21, 1896. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

39 United States Circuit Court for the District of Washington.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Præcipe for Appearance.

To the clerk of the above-entitled court:

You will please enter my appearance as solicitor for defendant L. Edgar Diller, in the above-entitled cause.

F. S. GRIFFITH,
518 *Seattle Nat'l Bank Bldg., Seattle, Wash.*

(Endorsed:) Præcipe for appearance. Filed May 16, 1896. A. Reeves Ayres, clerk. E. A. Colvin, deputy clerk.

40 In the United States Circuit Court for the District of Washington, Northern Division, Holding Terms at Seattle.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Demurrer to Bill.

Demurrer of the above-named defendant, L. Edgar Diller, to the bill of complaint of the above-named plaintiff.

To the honorable judges of the circuit court of the United States for the district of Washington:

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, demurs to the said bill.

And for cause of demurrer shows:

I. That it appears by the plaintiffs' own showing by the said bill that he is not entitled to the relief prayed by said bill against this defendant.

41 II. That it appears from said bill of complaint of plaintiff that this court has no jurisdiction to hear and determine this action.

III. That said bill of complaint of plaintiff is wholly without equity.

Wherefore and for diverse other good causes of demurrer appearing on said bill, this defendant demurs thereto, and he prays the judgment of this honorable court whether he shall be compelled to make further or any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in his behalf sustained.

F. S. GRIFFITH,
Solicitor and of Counsel for Defendant.

STATE OF WASHINGTON, } ss:
County of King, }

F. S. Griffith, being first duly sworn, on oath says: That he is the solicitor for the defendant in the above-entitled action, that in his opinion the foregoing demurrer is well founded in point of law, and on behalf of the defendant says that the same is not interposed for delay. The defendant being without the United States.

F. S. GRIFFITH.

Subscribed and sworn to before me this 10th day of May, 1896.

[SEAL.] HIRAM J. JACOBS,
Notary Public in and for the State of Washington,
Residing at the City of Seattle, Washington.

42 (Endorsed:) Filed May 16, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by E. A. Colvin, deputy.

In the United States Circuit Court, Holding Terms in the City of Seattle, in and for the District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Notice of Argument of Demurrer.

To L. Edgar Diller, the above-named defendant, and F. S. Griffith, his solicitor:

You and each of you are hereby notified that plaintiffs have set the demurrer to the bill of complaint heretofore filed by you, for argument before said court at the court-room in Seattle for Tuesday the 26th day of May, 1896, at the coming in of the court upon said day or as soon thereafter as the same can be heard.

JENNER & LEGG,
Solicitor for Plaintiffs.

43 Service of a copy of the above notice setting defendant's demurrer to plaintiffs' bill for May 26th, 1896, is hereby admitted and acknowledged this 22nd day of May, 1896.

F. S. GRIFFITH,
Solicitor for Defendant.

(Endorsed:) Notice. Filed May 25, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

In the United States Circuit Court, Holding Terms at Seattle, in and for the District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Order Overruling Demurrer.

And now on this 26th day of May, 1896, the above-entitled cause came on to be heard upon the demurrer of defendant to the bill of complaint of said plaintiffs, and after hearing the argument
44 of the solicitors for the respective parties, the same was taken under advisement, and now, on this 29th day of May, 1896, the court being fully advised in the premises, it is ordered that the demurrer be overruled, and that defendant have ten days in which to answer.

C. H. HANFORD, *Judge.*

(Endorsed:) Order. Filed May 29, 1896. In the U. S. circuit court. By A. Reeves Ayres, clerk. R. M. Hopkins, deputy.

In the United States Circuit Court in and for the District of Washington, Northern Division, Holding Terms at Seattle.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant.
} No. 537.

Plea and Answer.

45 The plea of the above-named defendant, L. Edgar Diller, to the bill of complaint of the above-named plaintiff.

To the honorable judges of the circuit court of the United States in and for the district of Washington:

The defendant, L. Edgar Diller, by protestation not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true, in such manner and form as the same are set forth and alleged, pleads to the same and for plea says:

That the certificates or receipts No. 7081, dated at Olympia, W. T., at the receiver's office, April 30th, 1893, acknowledging the receipt of $400, for the northwest quarter of northeast quarter and north half of northwest quarter of section 13, and the southeast quarter of the southwest quarter of section 12, all in township 36, north of range 3 east, Willamette meridian, containing one hundred and sixty acres, as described in plaintiffs' complaint, was on the 9th day of August, 1888, suspended and held for cancellation by the Commissioner of the General Land Office of the United States, upon the representations and report made to him by a special agent of the United States Land Office, that said certificate or receipt had been fraudulently obtained by said Henry C. Hackley, and that he had made purchase of said land in fraud of the United States under the laws of the United States commonly known as the timber and stone act of 1878, by swearing that the same was taken for his own benefit, and that the title that he might acquire from the United States would not inure to the benefit of any other person or persons, and thereupon the Commissioner of the General Land Office,

46 in accordance with the rules and regulations of the Land Office of the United States, directed the register and receiver of said land office at Seattle, to notify the said Henry C. Hackley and his transferees Stephen S. Bailey, Ravaud K. Hawley, and Russell A. Alger to appear before the said register and receiver and show cause, if any they had, why said certificate should not be cancelled, within sixty and ten days.

That thereafter on the 23d day of August, 1888, the said receiver and register did cause notice to be served upon said Henry C. Hackley and his transferees, in accordance with the directions of said Commissioner of the General Land Office, and thereafter said transferees within said sixty and ten days appeared before the said register and receiver to show cause why said entry or certificate should not be canceled. Thereafter the said register and receiver in accordance with the rules and regulations of the Land Depart-

ment of the United States proceeded to investigate the question as to whether said certificate was obtained by said Henry C. Hackley in fraud of the United States laws, that said transferees were represented by their counsel in said investigation, that witnesses were duly and legally sworn and examined before the register and receiver in the course of said examination on behalf of the United States and said transferees, and that the register and receiver, after hearing the evidence and the respective counsel for the transferees and the United States, were divided in their opinion, in that said register recommended said entries be cancelled, and the
47 receiver recommended that they be removed from suspension and passed to patent.

Under the rules of the Land Department all the papers in said hearing were sent to the Commissioner of the General Land Office, who, after hearing oral as well as printed arguments, and after a full consideration of the testimony submitted before the said register and receiver, found and decided that the said entry of said Henry C. Hackley was regular, that the land embraced therein was subject to entry, and that the same was taken by said Henry C. Hackley for his own use and benefit, and not in the interest of any other person, nor for any other person's benefit.

Thereafter the said decision of the Commissioner of the General Land Office was reviewed by the Secretary of the Interior Department of the United States, together with the testimony and all other papers in the case, and on the — day of ——, 1893, the Secretary of the Interior Department of the United States reversed the decision of the Commissioner of the General Land Office, and held that said entry was made, and said certificate obtained, not for the exclusive benefit of said Henry C. Hackley, but in the interest and for the benefit of Stephen S. Bailey, and ordered the Commissioner of the General Land Office to cancel said entry; that thereafter on the 21st day of November, 1893, the Commissioner of the General Land Office ordered the said entry and certificate of said Henry C. Hackley to be canceled upon the records of the Land Department, and the same was thereafter canceled.

48 That all of said acts of the Secretary of the Interior were in accordance with the laws of the United States, and of the Land Department of the United States, and within the province and jurisdiction of said Land Department, and of the Secretary of the Interior; and that said Henry C. Hackley was given every opportunity to be heard before the said officers of the Land Department of the United States, likewise his said transferees, before said certificate was canceled.

That thereafter on the — day of ——, 189–, this defendant, L. Edgar Diller, offered and was permitted by the register and receiver of the land office at Seattle, Washington, being in the land district where said lands were situated; to make a filing upon said lands under an act of the Congress of the United States, commonly known as the timber and stone act of 1878, and this defendant did on the said date make a filing on said land under said act, and on the — day of ——, 189–, in pursuance of said filing and agreeable

to said act, and having fully complied with all the requirements of the law relative thereto, and all the regulations and rules of the Land Department of the United States regarding the entry of public lands under said timber and stone act, so as to enable him to pay for said land and to claim a certificate and patent therefor from the United States, did at said United States land office, at Seattle, Washington, and within the land district where said lands are situated, purchase said lands from the United States, and he did then and there pay to the receiver of said land office the sum of four hundred dollars lawful money of the United States, that sum being the pur-
49 chase price of said land as fixed by said act; and upon showing compliance with all the requirements of said timber and stone act to the satisfaction of the receiver and register of said land office, and upon the payment of said sum of four hundred dollars as aforesaid, said receiver then and there made, executed, and delivered to this defendant, L. Edgar Diller, a certificate or receipt, known as a final or duplicate receipt, acknowledging the receipt of four hundred dollars in full for the above hereinbefore mentioned and described lands, and for the fees of the said register and receiver in the sum of — dollars. Which said entry was thereafter allowed by the Commissioner of the General Land Office, and on the 15th day of October, 1895, a patent was issued to this said defendant by the United States, conveying to said defendant, L. Edgar Diller, the above-described lands, and the whole thereof. That all of the acts and doings of this said defendant in obtaining title to this said land from the United States were done in good faith, and for his exclusive benefit and profit; that when this defendant made his application for and his filing upon said land, said land was by the records of the land office at Seattle, open for filing and purchase as clear public land of the United States.

All of which matters and things this defendant avers to be true, and pleads the same to the said bill, and prays the judgment of this honorable court whether he ought to make further answer to said bill.

F. S. GRIFFITH,
Solicitor for the Defendant Herein.

50 This defendant, answering in support of the foregoing plea as far as he is advised that it is material and necessary to make answer unto the plaintiffs' bill of complaint, saith:

That he knows not and has not been informed, save by plaintiffs' bill of complaint, and cannot set forth as to his belief or otherwise, whether the said Henry Hackley conveyed his title and interest in his said receipt or certificate to said Stephen S. Bailey by a sufficient deed of conveyance or at all; or whether said Stephen S. Bailey conveyed the said land to Ravaud K. Hawley and Russell A. Alger by a sufficient conveyance or at all; or whether said conveyance from said Hackley to said Bailey, or from said Bailey to said Hawley and Alger was in good faith; and denies that the said transfers or either of them were in good faith, without this, that there is any other matter, cause or thing in said plaintiffs' bill of

complaint material or necessary for this defendant to make answer unto; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct; and defendant humbly prays to be hence dismissed and discharged with his reasonable costs and charges in this behalf most wrongfully sustained.

I hereby certify that the foregoing plea, in my opinion, is well founded in point of law.

F. S. GRIFFITH,
Solicitor for the Defendant Herein.

51 STATE OF WASHINGTON, } ss:
County of King, }

F. S. Griffith, being first duly sworn, deposes and says that he is the attorney of record for the defendant herein, that the within plea is well founded in point of law and is not put in for delay, and that the foregoing answer is true as he verily believes; that he makes this affidavit for and on behalf of the said defendant for the reason that the said defendant is a resident of British Columbia and without the jurisdiction of the United States.

F. S. GRIFFITH.

Subscribed and sworn to before me this 6th day of June, 1896.

[SEAL.] A. H. FOOTE,
Notary Public in and for the State of Washington,
Residing at the City of Seattle, in said State.

(Endorsed:) Plea & answer to bill. Filed Jun- 6, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by E. A. Colvin, deputy.

We hereby accept service of a copy of plea and answer to bill of complaint and acknowledge receipt of a copy of the same.

JENNER & LEGG,
Solicitors for Plaintiffs.

52 In the United States Circuit Court, Holding Terms at Seattle, in and for the District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSEL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Notice of Argument of Plea.

To L. Edgar Diller, said defendant, and F. S. Griffith, his solicitor:

You will please take notice that solicitor for plaintiff- sets down your plea to plaintiffs' complaint for argument on Monday, June 15, 1896, at ten o'clock a. m., or as soon thereafter as the same can be heard by the honorable court.

JENNER & LEGG,
Solicitors for Plaintiffs.

Due *notice* of the foregoing notice admitted and copy received this 9th day of June, 1896.

F. S. GRIFFITH,
Solicitor for Defendant.

53 (Endorsed:) Notice. Filed June 15, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

In the United States Circuit Court, Holding Terms at Seattle, in and for the District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSEL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Order Overruling Plea.

And now, on this 15th day of June, 1896, the above-entitled cause came on regularly to be heard upon the plea made by said defendant to the bill of complaint of said plaintiffs, and after hearing the argument of solicitors for the respective parties, and the court being fully advised in the premises, it is ordered that said plea be overruled.

C. H. HANFORD, *Judge.*

54 (Endorsed:) Order. Filed June 15, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

In the United States Circuit Court, Holding Terms at Seattle, in and for the District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSEL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Replication to Answer.

The replication of Ravaud K. Hawley and Russell A. Alger, plaintiffs, to the answer of L. Edgar Diller, defendant.

To the honorable judges of the circuit court of the United States for the district of Washington:

These repliants saving and reserving to themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, *and* for replication thereto says that
55 they will aver, maintain, and prove their bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants with-

out this; that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things these repliants are and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

JENNER & LEGG,
Solicitors for Plaintiffs.

Due service of the above replication admitted and copy received this 16th day of June, A. D. 1896.

F. S. GRIFFITH,
Solicitor for Defendant.

(Endorsed:) General replication. Filed Jun- 17, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by E. A. Colvin, deputy.

56 In the Circuit Court of the United States, District of Washington, Ninth Judicial Circuit, Northern Division. In Equity.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Testimony and Proofs.

This cause having, on June 17th, A. D. 1896, been duly referred to me, the undersigned, United States master in chancery, to take proofs, certify and return the same to this court with all convenient speed, and said order having been brought to me by Jenner & Legg, solicitors for said plaintiffs—

On motion of Jenner & Legg, said solicitors, Tuesday, June 23, 1893, at 10 o'clock in the forenoon of that day, and room No. —, Hotel Spokane, in the city of Spokane, county of Spokane, Washington, are by me assigned as the time and place for hearing same, notice of which is hereby given.

57 Given under my hand and official seal this 17th day of June, A. D. 1896.

(Signed) EBEN SMITH, [SEAL.]
United States Master in Chancery of said Court.

JENNER & LEGG,
Complainants' Solicitors.

In the United States Circuit Court for the District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Complainants,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Assignment of Time and Place to Take Testimony.

UNITED STATES OF AMERICA,
District of Washington, Northern Division, } *ss:*
County of King,

Be it remembered, that on June 17th, 1896, said cause having been duly referred to me, the undersigned, master in chancery for the district of Washington, northern division, to take proofs, certify and return the same to this court with all convenient speed, and said order having been brought to me by Messrs. Jenner & Legg, solicitors for complainants on motion of said Jenner & Legg, said solicitor- for complainants, Tuesday, June 23d, 1896, at ten o'clock in the forenoon of that day, in room 325, Hotel Spokane, city of Spokane, county of Spokane, State of Washington, were by me assigned as the time and place for hearing same, and thereupon notice thereof was duly given under my hand and official seal.

That on said 23d day of June, 1896, at ten o'clock in the forenoon of that day and at room 325, Hotel Spokane, in the city of Spokane as aforesaid, said complainants appeared by C. K. Jenner, Esq., of said firm of Jenner & Legg, and defendant appeared by F. S. Griffith, Esq., his solicitor, and by consent of solicitors said hearing and taking of proofs, etc., was then and there continued until Thursday, June 25th, 1896, at the hour of ten o'clock in the forenoon of that day at the same place.

That on Thursday, June 25th, 1896, at the hour of ten o'clock in the forenoon at the same place, the complainant- appeared by C. K. Jenner, one of said complainants' solicitors, and the defendant appeared by F. S. Griffith, Esq., his solicitor, and thereupon the following proceedings were had, that is to say:

Said complainants' solicitor returned the notice of assignment of time and place of hearing, with admission of service thereon endorsed by said F. S. Griffith, solicitor for defendant, and the same is herewith returned, and thereupon Stephen S. Bailey was produced as a witness for and in behalf of said complainants before me and by me duly cautioned and sworn, and testified as hereinafter appears.

That thereafter, on, to wit, the 24th day of July, 1896, at the hour of ten o'clock in the forenoon, at my office, 715 New York block, city of Seattle, King county, Washington, said parties by their respective solicitors again appeared by consent, and Henry C. Hackley was then and there produced for and on behalf of the com-

plainants in said cause as a witness therein, and was thereupon by me duly cautioned and sworn, and testified as hereinafter appears.

Testimony of S. S. Bailey.

STEPHEN S. BAILEY, produced as a witness for and on behalf of the plaintiffs, being by me carefully cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, and by plaintiffs' solicitor, Mr. Jenner, orally examined, testified as follows:

Q. State your name, age, residence, and occupation.

A. Stephen S. Bailey; my age is fifty. I claim Spokane as my residence; occupation that of a miner—mining man.

Q. How long have you resided in the State of Washing-
60 ton, Mr. Bailey, or in what is now the State of Washington?

A. I came to the State of Washington in 1881 or '2, I am not sure now which—in the fall of 1881, I think it was.

Q. State whether or not you are the same man named as Stephen S. Bailey in the case entitled The United States *vs.* S. S. Bailey and Ravaud K. Hawley and Russell A. Alger, transferees, Henry C. Hackley, and eleven other entrymen, which case was heard in 1889, before the Seattle land office?

A. I am the same man.

Q. Where did you reside in the year 1883?

A. City of Seattle, State of Washington.

Q. What was your occupation at that time?

A. That of a hotel-keeper.

Q. What portion of the year 1883 did you reside in Seattle and keep hotel?

A. I think the only portion of that year—I think I quit Seattle, quit that business, somewhere in the fall—October, if I am not mistaken, of 1883.

Q. Are you, and were you, acquainted with Henry C. Hackley, an entryman under the law of June 3, 1878, generally known as the timber law, of the northwest quarter of the northeast quarter, and the north half of the northwest quarter of section 13, and the southwest quarter of the northwest quarter of section 12, all in township thirty-six north, range three east, Willamette, situated in the county of Skagit?

61 A. I was acquainted with Hackley, with Henry C. Hackley, but I am not positive absolutely of that description there of the property you mention. My mind does not retain the numbers as you have given them there.

Q. State whether or not you purchased the timber claim that was entered by Henry C. Hackley, and for which he received his duplicate receipt from the Government.

A. I did.

Q. Where was that timber claim located—in what county?

A. It was in either Whatcom or Skagit county; at that time, I think, it was in Whatcom county, and afterwards the county was divided and became Skagit county.

Q. Where did you first know Henry C. Hackley?

A. I do not now remember the exact time that I made his acquaintance, but it was some time during the year of 1883.

Q. Was it before or after you purchased his timber claim?

A. Well, I cannot say with regard to the time Hackley lived in the city of Seattle. I don't know—I don't remember the month. I don't remember the month I purchased of him at this time. I should if I had some data before me, I probably could recall it, but I have no data, no papers, nothing of that kind, having lost everything of that kind in losing my valise. I have no data at all to refresh my memory from.

Q. What was the nature and extent of your acquaintance with Mr. Hackley in 1883?

A. My acquaintance with him was just casual. I don't remember of ever being very well acquainted with the man.

62 Q. How did you come to know him? What were the circumstances under which you first met him?

A. I think he stopped at my hotel.

Q. As a guest?

A. As a guest.

Q. What business transactions, if any, had you ever had prior to your purchase from him of the timber claim entered by him?

A. None whatever outside of that business. That would naturally bring us together as keeper of a hotel and as guest of the hotel.

Q. State whether or not you conducted the negotiations personally with Mr. Hackley at the time you purchased his timber claim.

A. I did not.

Q. Who did conduct the negotiations if you know?

A. A man by the name of Theodore Lohr.

Q. State at what time you first knew that Henry C. Hackley had entered or was about to enter the timber claim which you subsequently bought?

A. I do not remember anything of that. The only knowledge that my mind now serves me in the matter, is the fact that that claim came to my knowledge to be purchased through Mr. Lohr.

Q. What knowledge had you with regard to the Hackley entry previous to the time that the negotiations were made with Hackley for your purchasing the claim?

A. I had none.

Q. When did you purchase the claim from Henry C. Hackley, fixing the time with reference to the time of the issuance of the duplicate receipt to him by the Land Department for the claim—was it before or after that?

A. It was after.

63 Q. State whether or not to your knowledge Henry C. Hackley made entry of that timber claim at the solicitation or suggestion of either yourself or any other person?

A. I have no knowledge that he moved in that direction at all. There was no suggestion from me nor any other party that I had any connection with.

Q. State what amount of money or moneys you furnished or means of any kind you furnished to Henry C. Hackley previous to the time you made the purchase of his timber claim, towards his securing the timber claim, or for any other purpose?

A. Not a dollar, sir.

Q. Now, Mr. Bailey, I would like to have you relate as fully as your memory serves you the circumstances under which you became a purchaser of the Hackley claim, and whether you about that time purchased other claims, and for what reason you made those purchases—state as fully as you can.

A. I was, in order to get at the beginning of it, of everything—I presume that is what you wish?

Q. Yes, I want the full history of it.

A. Yes, sir. It was in the year of 1883 that I was engaged in the hotel business, the New England hotel, in the city of Seattle. My business was reasonably prosperous and profitable, and having money on hands I desired to make investments. Listening, as I had at different times, to the opinion of people about the advance of timber—the probable advance of timber lands in that country, why I kept my attention directed in different places with a
64 view of acquiring timber when anything came to my knowledge, and that was as a matter of course, a short time prior to my investment in this property. A gentleman by the name of Mr. Lohr, who was then examining timber lands, and was reported as a timber expert and timber cruiser, timber estimater, came to my notice, and he mentioned to me the fact of lands down in Skagit or Whatcom county, of a good quality of timber and he desired that I should make some investments there, recommending that they were valuable lands, or would prove to be valuable for the timber, speaking of the quality of the land and timber paying excellent—and I handled the matter over in my mind for a short time, and finally I made up my mind that I would put some money in that section. I myself had not very much experience in the quality of timber so as to be a competent judge, and I made arrangements with Mr. Lohr for the cruising and examination of the timber that might be on the land, and in my negotiations with him on the question he became interested with me through services that he would render in the way of making reports as regarded the quality of the timber and the amount that would be on each subdivision, each one hundred and sixty acres that might be before me for to purchase, and in conversation with him I think he mentioned to me that while a cruiser's wages were five or ten dollars a day, or something to that effect, it would take quite a few hundred dollars to go through and estimate land in different sections of the country that might come to his notice, and I didn't feel myself like paying that amount, and so I made a proposition to Mr. Lohr that all land that he might report on and examine, that
65 I would make him a party in interest, providing that I should purchase, and if I didn't purchase, why he should receive no pay for any examination that he made of the land that might come to my notice; and for such services as he would render in cases of

that kind that I would make him a party in interest after the land—after the sale of the land, a certain per cent. of the profits should be his. I would first take back my original investment. I don't remember whether our understanding was to the effect that a rate of interest should be figured upon my investment or not, but he was to receive therefor an interest in the profits of the sale of the lands that I might purchase after his examination, from his examination and recommendation that it was good timber land.

Defendant's solicitor desires to interpose an objection to each and every of the questions propounded to the witness and the answers given, upon the ground that the land office made a decision on this matter, and that it is out of the jurisdiction of this court.

(It is understood and agreed by the solicitors for the respective parties, in the presence of the master, that said objection shall be deemed interposed to each question propounded to the witness, and each answer given by him, without further repetition thereof.)

Q. Who furnished the money for the purchase of the Hackley claim, or, in other words, what portion of the purchase-money did Lohr or any other person than yourself furnish, if any?

A. No person. I furnished all the money.

66 Q. What claims, or how many claims of one hundred and sixty acres each, or thereabouts, did you purchase under that agreement with Mr. Lohr?

Defendant's solicitor objects to the question on the ground that it is incompetent, irrelevant, and immaterial to the issues.

A. I think there was fifteen or sixteen claims that I purchased under that agreement with him.

Q. There were twelve claims held for cancellation in the case first mentioned by me—state whether or not all of the twelve claims were purchased by you under that agreement with Mr. Lohr.

Defendant's solicitor objects to the question on the ground that it is leading.

A. They were.

Q. In what capacity did Mr. Lohr act in this business of purchasing timber lands which you acquired under that agreement?

A. Well, in the capacity of cruiser, as I should term it, examining the timber with a view to its quantity and quality, and making report thereon.

Q. To whom did he report?

A. To me.

Q. State who it was that had the power of deciding, and did decide, whether or not to purchase any particular claim.

Defendant's solicitor objects to the question on the ground that it is incompetent, irrelevant, and immaterial.

67 A. I had the sole power.

Q. State what amounts of money you furnished Mr. Lohr

for the purpose of carrying out this agreement, if any money was furnished him by you.

A. I don't remember of having furnished him anything.

Q. State, if you know, who furnished Henry C. Hackley the money for his filing fees, location notice, and the amount which he paid to the Government for the land.

A. I have no knowledge of who furnished the money.

Q. State whether or not, in any instance, you furnished the means to any one of the entrymen of the claims purchased by you, or whether you ever, in any other instance, furnished the means for the entrymen to make final proof and payment.

A. I never have.

Q. Do you know where Russell A. Alger resides?

A. Only from general information.

Q. You have had correspondence with him?

A. I have.

Q. Where does he reside? What State?

A. The place of that address was Detroit, Michigan, the place I addressed my letters to him.

Q. Where does Ravaud K. Hawley reside?

A. I never had any correspondence with him. I know by general information that he is a resident of Ohio.

Q. Do you own the claims mentioned heretofore at the present time, and, if not, to whom did you sell the northwest quarter of the northeast quarter of section thirteen, and the north half of
68 the northwest quarter of the same section, and the northeast quarter of the northwest quarter of section twelve, township thirty-six north, of range three east, of the Willamette meridian, assuming the land just described by me to be the land you purchased from Henry C. Hackley?

A. I sold the same to Alger and Hawley.

Q. The plaintiffs in this case?

A. The plaintiffs in this case.

Q. Were Hawley and Alger, or either of them, here in the State of Washington when you made this sale to them?

A. Not to my knowledge.

Q. Where was the contract to sell and the sale made—in this State?

A. This State, in the city of Seattle.

Q. Who represented Hawley & Alger and conducted the negotiations for the purchase of that property from you?

A. I think a gentleman named Mr. Shannon—I believe that was his name.

Q. Do you know where Mr. Shannon is now?

A. I do not, sir. His first approach to me for the sale of that land was in the city of Spokane where he first approached me for the sale of the land to Hawley and Alger, and afterwards we really terminated the negotiations in the city of Seattle.

Q. State whether or not the party or parties representing Hawley and Alger in that purchase demanded of you an abstract of title before the purchase.

Defendant's solicitor objects to the question on the ground that it is immaterial.

69 A. Well, sir, I am not positive in regard to that; my mind is a little blank. It seems to me, however, there was an abstract of title furnished.

The master states to the witness that the question was whether or not he was asked for one.

A. I don't remember now whether that was the case. I could not say upon that point. My mind seems to be a blank upon it.

Q. Do you know whether or not the title was passed upon by an attorney representing Hawley & Alger previous to the purchase?

Defendant's solicitor objects to the question on the ground that it is immaterial.

A. I think the land-office records were examined and also the records—well, I don't know that there was any other records at that time—yes, there were the records——

Q. Of Skagit county?

A. Yes. I don't know whether there was an abstract finished, but the records were examined and also an examination in the land office, if I remember correctly, and everything seemed to be all satisfactory.

Q. How many claims did you sell to Hawley & Alger?

A. Well, I am not sure. I think there was two or three claims in the lot I purchased, in the whole contract, that was abandoned at that time, or became abandoned soon after. I think I sold
70 them somewhere, if I remember correctly, near twenty-five hundred and twenty-six hundred acres of land.

Q. State whether or not you sold to them at that time all of the twelve claims which were held for cancellation in the land office case that I first mentioned in your examination.

Defendant's solicitor objects to the question on the ground that it is immaterial.

A. I did sell them the twelve claims in question.

Q. What was the purchase price paid by them?

A. Well, I think it was ten dollars an acre, amounting to—the purchase price amounted to something near to twenty-four thousand dollars, they having paid me ten thousand in cash and there was a balance due of close to fourteen thousand dollars, thirteen thousand and some odd dollars, if I remember.

Q. State whether or not the balance was to draw interest.

A. It was, drawing six per cent. interest.

Q. State, Mr. Bailey, what information you had at that time you purchased the claim of Henry C. Hackley of the intention that Mr. Hackley had at the time that he filed upon this timber claim relative to the use or disposition that he might make of the land when he acquired the same from the Government of the United States.

A. I had no knowledge of any intention which he might have had.

71 Q. State whether or not you remember the fact and the time that the hearing of this case of The United States *vs.* S. S. Bailey and others were had in the land office at Seattle.

Defendant's solicitor objects to the question on the ground that it is immaterial.

A. Whether I remember the time?

Q. Yes—that is, whether you remember the time and whether you remember the fact of the hearing?

A. I do.

Q. Where were you residing at that time?

A. In this city—Spokane, State of Washington—well, let me qualify that a little—I was living in this city at the time the case was being got ready for trial, but the fire came here in August and I soon thereafter moved to Portland, Oregon, and I think I was there engaged in the hotel business, in Portland, Oregon, at the time the case was finished up. I might have been here at the time of its commencement, but before the case was finished I think I was in the city of Portland, the case having run about sixty days or more.

Q. Three months.

A. Yes; I had a chance to move around quite a bit.

Q. You had notice of that hearing in the land office, before the land office, did you not?

A. I did.

Q. And that you were the defendant?

A. I was.

Q. What was your physical condition at that time, Mr. Bailey, as to your health?

72 Defendant's solicitor objects to the question on the ground that it is incompetent and immaterial.

A. My health was not very good at the time.

Q. What was your financial condition at that time?

Defendant's solicitor objects to the question on the ground that it is cross-examination of his own witness.

A. My financial condition was simply, I was—I had no means, no finances whatever after the fire of 1889.

Q. State whether or not you made a defense at that hearing personally or by attorneys representing you?

Defendant's solicitor objects to the question on the ground that it is cross-examination.

A. I did not.

Q. Why did you not?

Defendant's solicitor objects to the question on the ground that it is cross-examination.

A. I did not have means sufficient to carry on the case.

Q. State whether or not if you remember——

A. It might be—let me make this mention; I did have some

understanding with an attorney to take my part of the case, but I afterwards told him my situation, and that I would be unable to pay, and the result was that he discontinued.

73 Q. Let me call a matter to your recollection, Mr. Bailey, that I think will probably not be objectionable, for the records will show—I will ask you if you did not employ the firm of Ostrander & Gregory, a firm of land-office attorneys, at Seattle?

A. Yes; that is the name. I could not remember the name. That is the name I had reference to.

Q. To represent you at this hearing, and that they entered their appearance, and did represent you at the hearing the first day of the hearing before the local land office at Seattle, and that they, after the first day, dropped from the case?

A. That was the fact of the case, sir.

Q. Now, if you know, state in this connection the reason that Ostrander & Gregory withdrew from the case at that time.

A. Well, the reasons, as I now remember, were that I, myself, was without any means—I was unable to proceed in the case in a manner that would be satisfactory to my attorneys.

Q. What is the value, in your opinion, generally, of the tract of land, the description of which I have read to you in connection with other questions, that was embraced in the entry of Henry C. Hackley, but is now in controversy in this suit?

A. What is the present value?

Q. Yes.

A. Well, that would be rather a difficult question for me to answer just now.

Q. Well, generally, as timber lands have been in ordinary times, and are in ordinary times in that section of the country?

A. I should think the lands safely had a value of $15 to $20 per acre.

74 Q. Making an aggregate of twenty-five hundred or three thousand dollars, you think?

A. Somewhere there; twenty-five hundred for one hundred and sixty acres, yes.

Q. When did you first become acquainted with Mr. Lohr?

A. Well, it might have been in the close of the winter of 1882 or the beginning of the winter of 1883. Close of the year 1882, or the beginning of the year 1883; I am not sure which.

Cross-examination of S. S. BAILEY:

Upon cross-examination by defendant's solicitor, Mr. Griffith, witness testified as follows:

Q. Mr. Bailey, where did you reside before coming to Washington?

A. I resided a short time in Portland, Oregon; prior to that time, on the southern coast of Oregon.

Q. You have lived on this coast all your life practically, have you not?

A. Well, sir, I have lived on this coast for nearly forty-four years

Q. You did not know Mr. Hawley and Mr. Alger prior to these land dealings, did you?

A. I did not, sir.

Q. When did you first conceive the idea of entering into speculation in timber lands?

A. Well, it was during my engagement in business in Seattle, in the year I think, of 1883, spring of 1883, or it might have been close of the year 1882.

75 Q. What first caused you to enter into the purchase of timber claims?

A. Well, what directed my thought in that line was the fact that I had lived on the southern coast of Oregon in a place known as Marshfield, Coos county, having gone there in '71 or '72, I think—1871 or 1872, and having been in business in the town of Marshfield, in the hotel business, at different times I became acquainted with men interested in timber lands—having timber lands for sale in that section, and knowing that lands which had been sold there for a small figure had advanced three or four or five times the amount that had been paid for them by purchasers and investors, I made up my mind that a timber investment would be a better investment than possibly town property or farm property, and that was about the drift of my thought at the time, which took me into the purchase of timber lands.

Q. That was prior to coming to Seattle?

A. Yes, sir.

Q. Did you immediately upon coming to Seattle attempt to purchase timber claims?

A. Well, I came to Seattle in 1882, I think—I came to Seattle in August, 1882, I think, and this took place in the following year, 1883, in the fore part of that year, the spring of the year—some months thereafter.

Q. You came, then, to Seattle, as I understand it, for the purpose of speculating in timber claims?

A. No, sir; I did not.

Q. You conceived the idea of purchasing timber claims after you arrived in Seattle?

76 A. I did. I had no knowledge of the timber country in that section before coming to Seattle.

Q. Isn't it a fact, Mr. Bailey, that you did not have much idea of purchasing timber claims until you met Mr. Lohr?

A. No, sir; it is not.

Q. When did you first meet Mr. Lohr?

A. Well, I am not sure whether it was in the close of the year 1882, or the beginning of the year 1883. I think he was in the city of Seattle, and I had some acquaintance with him in the close of the year 1882.

Q. You testified that you entered into, or had some agreement or arrangement with him—was that written or oral?

A. I don't remember whether we ever placed it in writing or not. I don't now remember.

Q. If it was in writing, would you have it?

A. Well, I never have had it, if it was in writing.

Q. What was the purport of that agreement, Mr. Bailey?

A. Well, the purport of the agreement was to this effect, that I had some intention or some inclinations to invest in timber lands, and Mr. Lohr having the reputation of being a timber cruiser and expert in timber lands, both as to its quality and quantity, that I should arrange with him that he examine all lands that I should wish to purchase; if that report prove to be satisfactory, and if I did purchase after he had made me his report in regard to the quality of the timber and the quantity, that if favorable that I should purchase the land, and for his services so rendered that he should have a certain interest in the proceeds that might
77 arise therefrom, after the money had been paid to me, of the purchase price, including the expenses, taxes, and all combined. I think that was about the substance of our agreement as I now remember.

Q. At that time, Mr. Bailey, what was your financial condition?

A. Well, my financial condition at that time was reasonably good, fairly so. I had a business and made money—no large amount, but I had a very profitable business there.

Q. How large an amount of money did you have at that time?

A. Oh, I don't know, I don't now remember. I had a few thousand dollars invested in my business. My business was running at a profit of fifteen hundred to two thousand dollars a month. I don't remember the amount of money I actually had on hands at any one time.

Q. This hotel was the New England hotel that you were running was it?

A. Yes, sir.

Q. How large a building was that?

A. Well, it was a building of about one hundred and eight rooms, I think, at the time I was running it.

Q. Were they all occupied?

A. Yes, sir, as a rule they were occupied. Not standing room in the halls hardly.

Plaintiffs' solicitor states that he does not like to object but does not see the relevancy of this line of questions.

Defendant's solicitor states that the reason for the exam-
78 ination is that the witness has testified that he was receiving from his business fifteen hundred to two thousand dollars a month, and that solicitor for defendant wanted to examine him particularly as to the derivation of that fund.

Q. What, if you know, was Mr. Lohr's financial condition at this time?

A. I have no knowledge.

Q. Isn't it a fact, Mr. Bailey, that Mr. Lohr was to locate these men on lands and then you were to purchase?

A. No, sir; no understanding of that kind ever existed between us.

Q. You were not present at that hearing in the land office in Seattle?

A. I think I was there for the first day or two.

Q. You didn't hear Mr. Lohr's testimony?

A. I did not.

Q. If Mr. Lohr testified to the fact that you would invest in lands where Mr. Lohr thought there was a good bargain, "that Bailey would furnish the money," if Mr. Lohr testified to that, was it true or untrue?

A. Well, in one sense of the word, if you will allow me to explain, it would come under the statement I made a while ago. That after he reported on lands, that if the timber thereon would estimate sufficient in quantity and quality, that I would purchase the land.

Q. In that estimate you did not take into consideration whether the selling parties had any title to it, or not, did you?

A. Certainly; I would not purchase without the parties had a right to sell.

79 Q. Did you ever advance any money to Mr. Lohr?

A. I did not, sir.

Q. Did you know anything about any of these entries before Lohr reported upon them to you?

A. I did not.

Q. Lohr never intimated to you anything about any prospective buys he had?

A. No, sir; not that I now remember.

Q. Did you know anything at all, Mr. Bailey, about any of these transactions that Lohr had with these entrymen—that is, did you know anything about Lohr's dealings with the entrymen in any way as a partner in the profits to accrue from the sales?

A. Let me see if I understand the question. (Question read.)

Plaintiffs' solicitor objects to the question on the ground of the use of the words "these transactions." It implies that something has appeared in this case showing that Lohr did have transactions with the entrymen. If the word "these" is stricken there is no objection to the question.

Q. Well, with any transactions with any of the entrymen?

A. The question I understand that you wish for me to answer is, Did I have any knowledge that Mr. Lohr—of Mr. Lohr's transactions with the entrymen prior to my purchase, or prior to making their final proof?

MASTER: Solicitor did not ask for anything as to the time, but simply whether you know.

80 Q. I want you to answer whether when you and Lohr were in partnership as to the profits to accrue upon the lands which you might buy or he might buy, did you know anything about his dealings with any of the entrymen, or getting the entrymen to settle on land whereby you could reap a profit?

A. I never considered Mr. Lohr was a partner of mine excepting in this way: that in case of any purchase or investment I made of any

lands proved to be successful and I afterwards could realize from the lands a price over and above the amount I had invested therein, that he had then a certain interest, and in case I did not he had no interest whatever. The property was absolutely in my name and under my control, and I never recognized him as a partner that I can see. You put your question recognizing him as a partner. I never had any knowledge whatever of Lohr's transactions with the entrymen in regards to purchasing the property, or with regard to any man settling upon the property for me.

Q. You furnished all the money to Mr. Lohr?

A. I furnished the money that paid for the property—that paid for the land. I didn't furnish any money to Mr. Lohr.

Q. That was after Lohr had shown to you that the entryman had entered and paid for the land, wasn't it?

A. Yes, sir.

Q. Mr. Bailey, in direct examination, the plaintiffs' solicitor asked you in regard to eleven other entries. Was each and every one of these entries purchased after the entrymen proved up and paid for his land?

81 A. They were. I think there was one, however, there was a question on one entry, that of Gilmore—some man—that there was a transfer made before the duplicate receipt had been made, several days before, through some delay in the land office for some cause or other, and the man made a transfer of the property before receipt of the land-office receipt, but the final proof had been made several days before.

PLAINTIFFS' SOLICITOR:

Q. And the money paid?

A. Yes, the money paid, which was proved afterward, I think—at least some evidence was furnished me afterward to show that the matter had been all regular in its proceedings. I don't now remember which claim—which one of the entries in the number of the twelve, but in some one entry the man had made his final proof, and paid his money some days thereafter—I think the land had been transferred from another party to him and he transferred to me, but that was done I think before the duplicate land-office receipt had been issued.

Q. As a matter of fact, Mr. Bailey, at the time of payment of money, a certificate is usually issued?

A. Well, that I know, yet I never entered a claim, but I think there was something in this line—I am not up in the details exactly of the matter, but there was some delay of the certificate from the land office.

Q. You had no dealings whatever with any of these entrymen?

A. I had not, sir.

Q. When did you transfer this land to the plaintiffs herein?

A. I think it was in the year 1888 if I remember correctly,

82 1887 or 1888, in December—December, 1887 or 1888.

Q. Do you remember how long that was, Mr. Bailey, after you bought them?

A. That was nearly five years, four or five years.

Q. Had you parted with your title before the Commissioner of the Land Office cancelled the claims, or held them for cancellation?

A. I had.

Q. How long before?

A. It must have been a year or such a matter, as I now remember.

Mr. Bailey's testimony closed.

(The reading and signing of the above deposition by the witness is waived by consent in the presence of the master.)

Testimony of H. C. Hackley.

Now at this time, Friday, July 24, 1896, at the hour of ten o'clock in the forenoon, it is by solicitors for the respective parties agreed and stipulated in the presence of the master that the deposition of Henry C. Hackley, a witness on behalf of the complainants, may be taken before the master at this hour, at the master's office, 715 New York block, in the city of Seattle, State of Washington, without notice thereof, notice being hereby waived by solicitors
83 for the respective parties, Mr. C. K. Jenner, of the firm of Jenner and Legg, for complainants, and Mr. Frank S. Griffith, for defendant, being present.

HENRY C. HACKLEY, produced as a witness for and on behalf of complainants, being by me duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, relating to this cause, and being by solicitor for complainants, Mr. Jenner, orally examined, testifies as follows:

Complainants' solicitor now offers in evidence certified copy of a warranty deed, of record in Skagit county, Washington, from Henry C. Hackley to Stephen S. Bailey, certified to by the auditor of Skagit county, Washington, and requests that the same be received in evidence, placed on file, and marked Complainants' Exhibit "A."

Defendant's solicitor objects to the introduction of any and all testimony that may be offered, upon the ground that the title to the land in question is in another party by the United States Government, and that the land office had jurisdiction to cancel the entry of Henry C. Hackley, and did so cancel it.

(It is understood and agreed that this objection shall apply to each and every question propounded to the witness and to each and every answer given by him, without further repetition thereof.)

(Certified copy of deed received in evidence, marked Complainants' Exhibit "A," and the same is herewith returned.)

84 Complainants' solicitor now offers in evidence certified copy of a deed and agreement by S. S. Bailey and wife to Russell A. Alger, of Detroit, Michigan, and Ravaud K. Hawley, of Cleveland, Ohio, conveying to the grantees therein named the northwest quarter of the northeast quarter, and the north half of the north-

west quarter of section number thirteen, and the southeast quarter of the southwest quarter of section number twelve, township thirty-six north, range number three east, of the Willamette meridian, containing one hundred sixty acres, more or less, and other lands therein described, which said deed and agreement appears of record in the office of the auditor of said county of Skagit, Washington, and is duly certified under seal by the auditor of said county as a true copy, and requests that the same be received in evidence, placed on file, and marked Complainants' Exhibit "B."

Defendant's solicitor objects to the introduction of said certified copy of deed, on the ground that it is incompetent and immaterial.

(The same is received, and is returned herewith marked Complainants' Exhibit "B.")

Complainants' solicitor now offers in evidence certified copy of notice of application to purchase timber land, in the United States district land office, at Olympia, Washington Territory, under act of Congress approved June 3, 1878, which application is for the northwest quarter of the northeast quarter, and the north half of
85 the northwest quarter of section thirteen and the southeast quarter of the southwest quarter of section number twelve, township thirty-six north, range three east, Willamette meridian, signed by John F. Gowey, register of the land office, also attached thereto, a certified copy of the certificate of the register, John F. Gowey, as to the posting of notice; also attached thereto affidavit of publication of notice of application to purchase timber land by James Power, the printer and publisher of the Puget Sound Mail, sworn to by James Power, before S. P. Brooks, notary public in and for Whatcom county; also attached thereto copy of the notice of application to purchase timber land, which said notice is the notice published by the publisher as aforesaid; also attached thereto copy of the testimony of the witness, under act of June 3, 1878, upon the application aforesaid of Henry C. Hackley to purchase the land last described, which is subscribed and sworn to before Wayne W. Holcomb; also attached thereto copy of the testimony of witness, under the act of June 3, 1878, in relation to the timber application of Henry C. Hackley for the lands aforesaid, which testimony is signed by Robert Lunden, and sworn to; also attached thereto non-mineral affidavit, subscribed by Henry C. Hackley, and sworn to before a notary public, upon application for title to said land; also copy of sworn statement under act of June 3, 1878, signed by Henry C. Hackley, and sworn to before John F. Gowey, register of said land office; also attached thereto copy of receiver's receipt, signed by Robert G. Stewart, receiver of said land office, for the sum of four hundred dollars in payment of the land last above described;
86 also copy of certificate signed by John F. Gowey, register, certifying that Henry C. Hackley, residing in King county, Washington Territory, had, on the day named in said certificate, purchased of the register of said office the land above described, and that the same contained one hundred and sixty acres at the rate of two dollars and a half per acre, amounting to four hundred dol-

lars; and that said Henry C. Hackley had made full payment of said amount as required by law. Across said certificate is this endorsement in ink: November 21, '93. Entry canceled. (F. H. J.) J. R. M. Chief Div. P.; with the endorsements upon the backs of the several papers offered, all certified to as true copies under the seal of the office of the Commissioner of the General Land Office of the United States, and certified to by E. T. Best, acting Commissioner of the General Land Office, and requests that the same be received in evidence filed herein, and marked Complainants' Exhibit "C."

Defendant's solicitor objects to the introduction of said papers on the ground that they are incompetent and immaterial.

(Papers received and returned herewith marked Complainants' Exhibit "C.")

Complainants' solicitor offers in evidence certified copy of the decision of the Secretary of the Interior, dated at Washington, October 19, 1893, in the case entitled United States *vs.* Stephen S. Bailey *et al.* in which decision the Secretary of the Interior orders the cancellation of the said timber entry of Henry C. Hackley

87 and other timber entries involved therein, signed by Hoke Smith, Secretary, and certified to by William H. Mills, acting Secretary of the Interior, under seal of the Department of the Interior, certifying the same to be a true copy of the original as it appears in the records of said department, and asks that the same be received, filed and marked Plaintiffs' Exhibit "D."

Defendant's solicitor offers no objection to said offer.

(Paper is received, and the same is herewith returned marked Complainants' Exhibit "D.")

Q. State your name, age, residence, and occupation, Mr. Hackley.

A. Henry Clay Hackley; I reside in Cleveland, Klickitat county, Washington; by occupation I am a stationary engineer; I am forty-two years old on the 4th of this coming September.

Q. Where did you reside in 1882, 1883, and 1884, Mr. Hackley?

A. I think I arrived in Seattle in 1883, in November—I am not exactly sure as to the date. I came here on the 6th day of November and left again on the 6th day of November, two years later. I never kept any special time, but I left the next day after the presidential election here.

Q. What presidential election?

A. When Cleveland was elected for the first term.

Q. Are you the same Henry C. Hackley who, on the 29th

88 day of January, 1883, made application to purchase, under act of Congress entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," the northwest quarter of the northeast quarter, and the north half of the northwest quarter of section thirteen, and the southeast quarter of the southwest quarter of section twelve, in township thirty-six north of range three east of the Willamette meridian?

A. Yes, I am the same Henry C. Hackley.

Q. The certified copy of your application and the papers show

that the application was made on the 20th day of January, 1883, and that the proofs were made in the same year, 1883. State where you resided at the time you made that timber application?

A. I resided in the city of Seattle.

Q. In what year then did you come to Seattle, do you now think?

A. I think I came to Seattle a year earlier—in 1882.

Q. How long did you reside in Seattle?

A. Two years to the day.

Q. Where did you reside, where was your stopping place at the time you resided in Seattle?

A. I stopped—boarded at the New England hotel.

Q. For how long a time?

A. I boarded there for the most of the two years. The last part of the second year I lived in Seattle I didn't board there. I was working up northeast of Olympia on coal lands.

Q. Who kept the New England hotel at the time you boarded there?

A. S. S. Bailey.

89 Q. What was your occupation during that time?

A. The most of the time I boarded with him I was working at house-building, with the exception—I think I worked at house-building altogether about nine months. The last part of the nine months, you might say, that I boarded there, I was building telephone lines and part of the time working on the railroad, and the other part bridge-building up here on the bay, and later breakwater building. I built all those breakwaters.

Q. For whom did you work at house-building? What building did you work on in the fall of 1882, and spring of '83?

A. The first house-work here was for Col. Squire, on what was known at that time as the Brunswick hotel. It was changed from an old opera-house to a hotel, and I worked on that first.

Q. Was Col. Squire the man who is now State senator, or United States Senator?

A. Yes; afterwards governor and now Senator.

Q. What pay did you receive for the work you did on this building?

A. I received three dollars and six bits for my first work, and four dollars a day afterwards, and a great portion of the time I worked until ten o'clock at night in finishing the inside of the building, for which I received half a day's pay for every evening's work, making about six dollars a day most of the time.

Q. What was your financial condition during the time you lived in Seattle, as to your employment proving remunerative or otherwise?

90 Defendant's solicitor objects to the question on the ground that it is cross-examination.

A. I always had plenty of money while here in Seattle. I was always getting good wages. I never lacked for funds, with the

exception of one time that I was sick, and then I sent off and got money.

Q. State why you applied for the purchase of the tract of timber land which you entered—what reasons or motives urged you to do so?

A. I considered from what I had learned in town, and what I had seen myself, that it would be a good investment; when times were good, to sell the timber land.

Q. After coming to that conclusion, what did you do?

A. Well, I found out there was a cruiser and several parties going up to examine lands, and I went with them for the purpose of securing a claim.

Q. Who did you go with?

A. I went with a gentleman, a lawyer here, for one, by the name of Wayne W. Holcomb, W. W. Holcomb—Billy Holcomb we called him. I had known him for a long time. He was in the party, and a cruiser and one other gentleman, I don't remember his name. I was never acquainted with him particularly. I knew his name at the time, but I don't know it now. He also took a claim at the same time.

Q. At whose request did you go to look for a timber claim, or at whose solicitation, if any one's?

A. I had never been solicited by any one. I had been
91 advised by different friends around town that it would be a good speculation, but I went at no one's solicitation. I went of my own free will, and from the fact that I supposed the timber claim would be profitable.

Q. What was your intention when you took that timber claim as to selling it or keeping it?

A. My intention at the time I took the claim was to keep it until it became valuable enough to warrant my taking the timber out or at such time as it became valuable enough for me to sell and make a profit out of the investment, if it became necessary for me to sell it.

Q. You paid for that timber claim, did you?

A. Yes, sir.

Q. Whose money did you pay for the timber claim?

A. I paid my own money.

Q. What lien or mortgage or pledge did you make at any time on your timber claim, or your right to that timber claim entered by you?

A. None whatever, previous to my proving up on it.

Q. After you proved up on it did you mortgage it?

A. No, sir, it never was mortgaged.

Q. Do you own that timber claim at the present time?

A. No, sir.

Q. To whom did you sell it?

A. To S. S. Bailey.

Q. What were the reasons for your selling it at the time you did?

A. Because at the time I sold it times were getting dull here, and I was contemplating matrimony at that time and expected to be

married shortly, and my wife's folks were not here, and my folks were not here, and our folks not being here and of course I
92 naturally wanted to get back where they were; and I considered at that time that times were changed here, and I needed the money and sold it.

Q. State whether or not at the time you filed upon that claim you had made any agreement or contract, directly or indirectly, whereby the title to the land which you might acquire by reason of said timber application would inure in whole or in part to the benefit of any other person than yourself.

A. No, sir.

Q. State whether or not at the time you submitted your proof and paid your money and received your duplicate receipt you had made any contract or agreement, either oral or in writing, whereby the title that you were about to acquire, and did acquire, from the Government of the United States, would inure in whole or in part to any one other than yourself.

A. I did not.

Q. State whether or not previous to your making payment for said timber claim any negotiations had been made with you or any talk had been had with you by any party whomsoever, looking to the purchase of that timber claim.

A. No, sir.

Q. State whether or not you were notified of the proceedings instituted in the year 1886 or 1887 by The Land Department of the United States *vs.* S. S. Bailey, Russell A. Alger and Ravaud K. Hawley, as transferees, and Henry C. Hackley, and eleven other entrymen, for the purpose of canceling your entry to this timber land, with eleven other claims.

A. No, sir, I never received any word from them from that day until a short time ago.

Q. Where were you residing in 1886 and 1887?

93 A. I resided in the town of Cleveland, where I am residing now.

Q. How far is that from railroad connection?

A. It is about twenty-two miles and a half from the nearest railroad.

Q. Who negotiated with you for the purchase of your timber claim when you sold the same?

A. Well, sir, I could not remember his name. I did at one time know his name.

Q. Was it S. S. Bailey?

A. No sir.

Q. What influence did S. S. Bailey at any time bring to bear upon you to get you to make the sale of this claim?

A. He never used any influence.

Q. You knew Mr. Bailey well, did you not?

A. Yes, I was well acquainted with him.

Q. What did you receive for your claim?

A. I received seven hundred dollars; I think that was the figure exactly—seven hundred dollars even.

Q. State whether or not you received that amount, or whatever the consideration was at the time you executed the deed?

A. No, sir, not on the same day I executed the deed.

Q. You received it though in coin, did you?

A. Yes, sir—that is I received—at that time I didn't receive the full amount of seven hundred dollars, but other parties I was owing at the time received some portions of it, but I the same as received the full amount at the time when I received the first.

Q. State whether or not you made application to enter said timber claim and did enter said timber claim in good faith and
94 for the purpose of appropriating the timber and its profits to your own exclusive use and benefit?

A. I will say that. Of course I will admit that I had no reasonable idea of ever using that timber.

Q. You mean cutting it?

A. Of cutting it. I had no idea of personally cutting that timber and disposing of the timber for use. My idea was to take the land and hold it until it increased in value and then sell to the best possible advantage.

Q. Either by stumpage or otherwise?

A. Any way I could get profit out of it.

Cross-examination of H. C. HACKLEY:

Upon cross-examination by defendant's solicitor, Mr. Griffith, witness testifies as follows:

Q. Mr. Hackley, when did you say you came to Seattle?

A. Well, I first said that I came here in 1883, but I wasn't sure of the date, but I think now I came in 1882, fall of 1882.

Q. What month, do you remember?

A. I arrived here on the sixth day of November.

Q. How long were you here before you received employment?

A. About three days.

Q. What was the first work you did?

A. The first work I did was on the Brunswick hotel. I think I done a day's work before that, but that was the first permanent job I got.

95 Q. What were your expenses at the hotel where you stopped?

A. At that time I paid seven dollars a week for board.

Q. And room?

A. Board and room.

Q. Seven dollars a week?

A. Yes. I had a first-class room on the ground floor, and paid a little more than the ordinary price.

Q. How long did you work there on the Brunswick building?

A. For little over six weeks.

Q. What was the next work you did?

A. Well, with the exception of a few days' work, I did one odd job and another, carpentering, etc., and I worked down at Stetson & Post's mill, running the planer for fourteen days.

Q. Do you remember what month that was in?
A. No, sir, I do not.
Q. How long were you idle after quitting on the Brunswick before you went to work at Stetson & Post's mill?
A. I wasn't idle to exceed a day or two, probably not that.
Q. What wages did you receive down there?
A. I started in there at two dollars and six bits a day.
Q. Was it increased at any time during the fourteen days?
A. Yes, sir.
Q. To how much?
A. Increased to three dollars a day the second week.
Q. Two seventy-five the first week and three dollars the second week?
96 A. Yes, I think that was the way. I could not swear positive as to that.
Q. What did you do after quitting Stetson and Post's mill?
A. I think the next piece of work I went at was on the telephone system.
Q. How long were you idle between working at the mill and going on the telephone system?
A. Probably not to exceed three days.
Q. How long did you work on the telephone system?
A. I probably worked there three months altogether.
Q. Were you working on the telephone system when you took up this land?
A. I don't remember for certain whether I was or not. It has been a long time ago, and such points as that are hard for me to remember, where I was working and what doing at the time.
Q. What wages were you getting from the telephone company?
A. I started in to work for them for three dollars a day, and afterwards I built a number of different lines by contract—contract for putting them up.
Q. When, in relation to the time you took up this land did you take these contracts—after or before?
A. I took the principal contract afterwards.
Q. The first contract?
A. No, the largest contract I had.
Q. That is with reference to your proving up on this land in 1883 that I spoke of your largest contract?
97 A. After I filed on the land—after I went up and examined the land and filed on it. The best contract I had was after I returned from this land and had filed on it.
Q. Was that before April or after April, 1883?
A. I think that it was in March. I am not certain. I would not state for certain whether it was or not, but some time in the early spring of 1883, after I filed on that land. It was a very short job. It didn't take me long to do it.
Q. Was that part of the three months' services you have testified as doing for the telephone company?
A. Yes, I said I was working for the telephone company—the work altogether occupied three months.

Q. What amount of money, if any, did you have when you came to Seattle?

A. I think I landed in this town with one hundred and eighty dollars.

Q. You testified on direct examination that you were owing some one—some persons, along about this time—how much were you owing?

A. That is, when I sold?

Q. Well, when you sold?

A. I owed Jack McDonald, who, I think, is on the detective force now, probably twenty-seven or eight dollars——

Q. Just the total amount of what you owed. I do not care about each individual, Mr. Hackley.

A. Oh, I owed about one hundred and fifty dollars, all told.

Q. Were those debts contracted prior to your selling this land, April, 1883, or whenever it was?

98 A. I haven't testified as to when I sold it.

Q. The documentary evidence will show that, Mr. Hackley, your deed will show it. You sold upon the thirteenth day of April, and proved up on the third.

(Question read.)

A. They were, yes.

Q. Why is it, Mr. Hackley, when you were getting so much money a day, and making so much money at the work for the telephone company, that you were still in debt?

A. Well, I am amongst strangers, and haven't the same modesty about how I came to be in debt as I would if at home, and I will tell you how I came in debt.

Q. I do not care particularly. What I want to know is why, when you were making so much money, you still ran in debt. That is all I care to know.

A. The reason why was that I was addicted to the vice of gambling in those days. Since, I am happy to say, I quit. I have been married twelve years, and I haven't gambled any since those days. I was gambling and had struck bad luck, and that caused me to borrow money from one of my friends.

Q. About one hundred and fifty dollars?

A. One hundred and five dollars I borrowed from him, three days before I proved up on this claim.

Q. You lost a great part of the money you earned other than what you paid for your room and board before you took up the land?

A. Sometimes I lost and sometimes I won, the same as any other man that follows gambling.

99 Q. For what purpose, Mr. Hackley, did you borrow that one hundred and five dollars in relation to this land?

A. None whatever. It had nothing to do with the land. I borrowed it in a poker game and spent it in a poker game.

Q. Is it not a fact, Mr. Hackley, that at the time you proved up on this land that you got some money of a man named Lohr?

A. No, sir; I never knew a man by the name of Lohr, as I remember of.

Q. Do you remember the man's name who showed you this land?

A. The man's name that showed me this land was a big Swede. He was a cruiser. I never did know his name. A large, red-faced, red-moustached Swede, a cruiser. This Lohr, I don't remember the name at all, though he may have been the very party that was with us at the time. I don't remember his name. I thought I would remember it, still I don't remember that Lohr was the name.

Q. A rather large man, was he?

A. Rather heavy-set, low man, with a black moustache. That is the man that accompanied us. It seems to me I have met that man Lohr, but I am not certain of it. If I met him I never had any acquaintance with him that would cause me to remember him.

Q. Which one of these gentlemen located you on this land—do you remember the man's name who located you?

A. Well, as near as I remember, William Wayne Holcomb
100 was the one that gave me the numbers of the land—his name was William, either William Wayne, or Wayne William. We always called him Billy. As I say, I knew him before I came here.

Q. What did you pay for locating that land?

A. I paid my part of fifty dollars.

Q. Explain what you mean by your part?

A. I mean three of us located land at the same time, as I understood it; I could not swear the others did locate land, but that is what they went for, and I paid my part of fifty dollars—one-third—to the cruiser that located the land.

Q. You are not sure whether or not it was Lohr that located you?

A. No, sir; I would not swear that it was or wasn't.

Q. Well, in the hearing before the United States land office, in the case that was mentioned by Mr. Jenner, The United States *vs.* yourself and eleven other entrymen, and Hawley and Alger, transferees, Mr. Lohr was a witness——

A. Yes.

Q. And in this opinion of the Secretary he cites the evidence of Mr. Lohr, namely, that he located several of the men, you among them——

A. Yes.

Q. Now, to the best of your recollection, is that true?

A. Well, if this man I speak of as not knowing his name was named Lohr.

Q. How many men were with you?

A. This man that went along with us, the cruiser, and the man you intimate might be Lohr, and W. W. Holcomb and my-
101 self were the three that located this land. W. W. Holcomb was a lawyer here in town and seemed to have quite a knowledge of land, had located land, etc., and I never had made a filing on land and knew nothing about land; never kept any ac-

count of how it was to be designated, and he told me the section that I was on, and who told him I could not tell you.

Q. Mr. Holcomb located a claim for himself?

A. It was understood by me that he did. I think he did.

Q. Three of you were in the party; that is all?

A. Four of us, counting the cruiser.

Q. Two other men located one hundred and sixty acres at this time?

A. I supposed so at the time, and have no reason to suppose otherwise.

Q. You don't remember their names?

A. No, sir—well, W. W. Holcomb—the others were both strangers to me at the time, and I haven't known them since, so I am unable to tell their names.

Q. Who negotiated this sale between you and Mr. Bailey, Mr. Hackley?

A. Well, that is something I am not clear about. I told Mr. Jenner I did not sell the claim personally, I never made any negotiations with Mr. Bailey, although he got the claim. Who it was I could not tell you. I supposed him to be a lawyer at the time and suppose him to be a lawyer yet, but I never knew his name.

Q. You knew before you transferred that Mr. Bailey was going to get it?

A. No, not until I transferred.

102 Q. Not until you transferred?

A. Not until I made the deed.

Q. Did this person who located you on the land offer you any sum over and above what you were to pay for it when you got title or any other time?

A. No, sir; I never had any offer by any person to let go of the land until after I had proved up on the land.

Q. When was the first offer made to you to sell?

A. Well, I think the offer was made me to sell promptly the next day—the next morning after I proved up on my land.

Q. Did you take it up at that time?

A. Not immediately. I took it up some time during the day, if my recollection serves me right—probably the next day. It was several days—I don't remember just how many—after I partly agreed to sell before I signed any deed, and before I received anything for it, and I never knew exactly how it was, because I didn't keep any record of it.

Q. Was Lunden the name of this cruiser?

A. I don't know as I ever heard surname. I think his name was Gus, I think we called him Gus.

Q. Didn't he make an affidavit for you under act of June 3, 1878, when you went to prove up at the land office?

A. I don't remember whether he did or not.

Q. Lunden is the witness here, and I am trying to see if I cannot call to your mind who this fourth party was; whether it was

103 Lohr or some other person, and these witnesses, I presume, must have gone with you at the time?

A. It must be that this Lunden was the cruiser. It might have been and might not have been. I cannot say, because I never had any acquaintance with the parties, excepting just that one time, and I never expected this to come up, and never kept my mind charged with anything in connection with it at that time.

Q. Who made the first approach to you to sell that land?

A. The man that negotiated with me for it; the one that first asked me for it, and the one that I finally made the bargain with to sell it, and of course, that man might have been Lohr, or Lunden, or any other man, so far as my recollection goes, because I didn't know him at the time, and after I made negotiations with him to sell, it wasn't necessary for me to know him, because, then, after he had agreed to pay me a certain price for the land, and came with a deed to make out, why, the deed was made out to Bailey, and I didn't care who bought the land so I knew who paid me the money for it afterwards. But I supposed him to be a lawyer of some kind or description.

Q. Did he represent himself to you as being a lawyer?

A. I don't think he did. I don't think he told me he was a lawyer.

Q. What gave you that idea?

A. General appearance of him. He had a kind of look about him that common folks haven't.

104 Q. Did this man state to you, Mr. Hackley, to whom he was going to sell his land?

A. No, sir; not until after the agreement was made.

Q. Did he say anything to you about the fact that he and Bailey were interested in buying lands, and that Bailey would buy lands?

A. No, sir; I didn't know anything about his interest in buying lands, or whether he had any, and I never knew, until the deed was made out and the purchase was made, that the land went to Mr. Bailey, when I signed the deed there.

Q. Did any one of these men that went with you at this time, or any other time when you went on the land, loan you any money or give you any money?

A. No, sir; I paid my own expenses and used my own money.

Q. Did you ever give a note or anything of the kind, Mr. Hackley, to this man who conducted the negotiations or who showed you the land?

A. No, sir; I never gave a note to a single individual in this town that I remember of.

Q. What amount did you say you got for your claim?

A. I say I got seven hundred dollars for it, according to the best of my recollection.

Q. Did you read this deed over before you signed it?

A. That I could not tell you. I don't believe I did.

Q. This deed recites a consideration of five hundred ninety-six dollars. Was that the true consideration—isn't it a fact that that was the true consideration?

105 A. I think that was the amount of money, probably, I received, but that wasn't the amount of money I sold for. I don't

remember of ever looking at the deed or examining it when I signed it. I would not have known whether the consideration in there was five dollars or seven hundred dollars, or what it was. As I said before, there were some debts I owed, and they were paid out of this money that I got from the sale of this land, and I paid these debts right there before I drew the money. I took the parties I owed and had them paid there out of this money that I had agreed to take for the land, and I got my money—all that was coming to me—signed the deed, and if I ever read the deed over I don't remember it, and knew the amount placed in the deed. As I said before, I would not swear that I got seven hundred dollars, but that is my recollection. It would be pretty hard to remember unless I went and figured up all the money I paid out of it. My impression is I received seven hundred dollars. It has been a long time ago, and I didn't notice things as closely as I do now. I was a little wild, and, when I wanted a few dollars, got it and never noticed where it went to.

Q. You bought this land on speculation, did you not?

A. As a species of speculation. If a man buys property and expects to profit by it, it is thereby a speculation, and that is the way I bought that land.

Q. Did you think by selling it you could make as much as if you kept it for some time?

A. No, sir; I felt if I kept the land two or three years it would be worth double the amount.

Q. You felt confident of that at that time?

106 A. Yes; I felt it would raise considerable above that value.

Q. Why did you deem it wise to sell it at that time?

A. I probably didn't deem it wise, but I deemed it expedient, under the circumstances, for various reasons. Probably one of the reasons was, I intended to get married, and wanted to get away from this town, where I had made and lost considerable money, and I was getting to be pretty wild at that time, and my family was entreating me to come home—my father was a minister of the gospel and tried to raise me right. I was kind of the black sheep of the family, and I felt it all the time—that is one reason I sold the land.

Q. You cannot fix in your mind, Mr. Hackley, the name of this gentleman?

A. No, sir; I cannot. If I could I would.

Q. Whether it was Lohr or not?

A. No. If I could I would.

Q. Mr. Lohr, in his examination as one of the witnesses before the land office, does testify that he did locate you.

A. I won't dispute his testimony a bit, because it might have been Lohr as well as any other man, because, as I say, I didn't know the man, and I haven't any recollection of any acquaintance with the man. It might have been Lohr or any other man.

Q. Mr. Hackley, Mr. Lohr also testifies that he conducted the negotiations between you and Mr. Bailey.

A. As I said before, it may have been the same man. I didn't know him.

107 Q. You will not say that it was not?

A. I won't say that it was not; no, sir.

Q. If he testified to that fact, it might have been true?

A. If he testified to that fact, it might have been true.

Q. In all probability it was?

A. In all probability it was, if he testified to it.

Q. You gave in your direct testimony, Mr. Hackley, the evidence that you were a stationary engineer?

A. Yes, sir, at the present time.

Q. When did you learn the carpenter trade?

A. Well, I worked at carpenter trade for quite a while, up on the Northern Pacific railroad, as bridge-builder. I was very handy with tools, and I never did house-work until I came to this town.

Q. You never did house-work until you came here?

A. No, sir; I worked in 1879 up on the Northern Pacific as bridge-builder.

Q. What were the running wages for first-class journeymen carpenters at the time you mentioned?

A. Three dollars and six bits to four dollars a day; the lowest for what you would call a good workman, three dollars and a half. If you want to know how I got three dollars and six bits a day I will tell you. It was kind of an event in my life.

Q. No; I do not care about that, Mr. Hackley. As I understand, this deed was made out, and you signed it, and were paid the money, without knowing anything about what sum of money was mentioned.

108 A. I think that is the case. At that time I was perfectly unused to business of that kind. I never owned an abstract, and never made a deed or anything of that kind.

Q. Did any of the men that went with you on the land ever talk it up before going into the land, and get you interested in investing money in timber land?

A. No, sir; not these parties—well, I say these parties; this man Holcomb may have advised me; I think he did. He said he was going to, and made the proposition to me if I would pay my share of the expenses, he would go up. That is, I pay my share of the cruiser's fees up and back. I think that is more than likely the fact; and an old friend of mine, Charlie Foster, working in Stetson & Post's mill at the time I first went there, advised me it was a good speculation to take up timber land. I had known him for twenty years in California.

Q. You don't know whether he took up a claim or not?

A. I do not think he did. He was working there in the mill, worked hard, supporting a large family—a good-sized family. I don't think he ever took up a claim.

Upon redirect examination by complainants' solicitor, Mr. Jenner, witness testified as follows:

Q. What interest, if any, have you, Mr. Hackley, in the land at the present time, or in this litigation—in the result of this suit?

A. None whatever that I know of. If I have, I don't know it.

109 (By consent of solicitors and witness before the master, the reading over and signing of this deposition is waived.)

Taking of proofs herein is, at this time, closed.

I do further certify and report that Maude Jay Wilson, stenographer, being satisfactory to the parties in said cause, was by me duly appointed to take said depositions, and did thereupon, in my presence, take the same; that the said solicitors for the respective parties elected to take said depositions by question and answer, and that said depositions were so taken, and then and there reduced to writing by said Maude Jay Wilson in the presence of said witnesses, and the reading of the said depositions and the signing of the same were by said witnesses respectively, and by said solicitors for the respective parties, waived.

I further certify that said complainants offered in evidence certain paper-writings, which were by me received and marked respectively, Complainants' Exhibits "A," "B," "C," and "D," and the same are herewith returned.

I further certify and report that by consent of respective solicitors true and correct carbon copies of said exhibits are hereto attached for the purpose of convenience.

I further certify and report that said depositions so taken are full, true, and correct as the same were given by said witnesses respectively.

110 I further certify and report that I have returned said papers so offered and marked as aforesaid with this my report to this court personally.

I further certify and report that the stenographer's fees for so taking said depositions amount to —.

And I further certify and report that I submit to this honorable court the amount of compensation to be fixed and determined by the court for said master in and about the taking of said proofs.

Given under my hand and official seal in the city of Seattle, King county, Washington, on this 28th day of July, 1896.

[SEAL.] EBEN SMITH.

EXHIBIT "A."

Vol. 3, Deeds, page 233.

Henry C. Hackley to Stephen S. Bailey. } Warranty Deed.

This indenture made this thirteenth day of April, A. D. 1883, between Henry C. Hackley, of Seattle, King county, Washington Territory, the party of the first part, and Stephen S. Bailey, of the same place, the party of the second part:

Witnesseth, that the party of the first part, for and in consideration of the sum of five hundred and ninety-six dollars, gold coin of the United States, to me in hand paid by the said party of the second

part, the receipt whereof is hereby acknowledged, do, by these
111 presents, grant, bargain, sell, convey, and confirm, unto the said party of the second part, and to his heirs and assigns, the following-described tract, lot, and parcel of land, situate in the county of King, and Territory of Washington, and particularly bounded and described, as follows, to wit: Northwest quarter of the northeast quarter and north half of the northwest quarter of section No. thirteen (13) and the southeast quarter of southwest quarter of section No. twelve (12), township No. 36 north of range three (3) east, of Willamette meridian, containing one hundred and sixty acres, more or less, together with the appurtenances, to have and to hold the said premises, with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

And the said party of the first part, his heirs, executors, and administrators, do by these presents covenant, grant, and agree to and with the said party of the second part, his heirs and assigns, that he, the said party of the first part, his heirs, executors, and administrators, all and singular the premises, hereinabove conveyed, described, and granted or mentioned, with the appurtenances, unto the said party of the second part, his heirs and assigns, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, or any part thereof, Henry C. Hackley shall and will warrant and forever defend.

Witness my hand and seal the day and year first above written.

[SEAL.] HENRY C. HACKLEY.

112 Signed, sealed and delivered in presence of—

W. W. HOLCOMB.
ALBERT LEUNDIN.

TERRITORY OF WASHINGTON, } ss:
County of King, }

On this 30th day of April, A. D. 1883, before me, W. W. Holcomb, a notary public, in and for said Territory, personally came Henry C. Hackley, to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[W. W. Holcomb, Notary Public, Wash. Ter.]

W. W. HOLCOMB,
Notary Public in and for Washington Territory.

Filed for record at the request of Geo. Coupe, at 9 a. m., May 4, 1883, and recorded and record compared and corrected May 9, 1883.

C. DONOVAN,
Auditor and Recorder of Whatcom County, W. T.

STATE OF WASHINGTON, } ss:
County of Skagit, }

I, H. Hammer, county auditor, of the county of Skagit,
113 State of Washington, do hereby certify that the annexed is a copy of deed wherein Henry C. Hackley is grantor, and Stephen S. Bailey is grantee, and that it is a true and literal exemplification and copy from the record as the same appears in volume 3 of Deeds at page 578, records of Skagit county, Wash.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Mt. Vernon, in said county, this 20th day of July, 1896.

[AUDITOR'S SEAL.] H. HAMMER,
County Auditor of Skagit County, Washington.

(Endorsed:) Compl'ts' Exhibit "A." Eben Smith, United States master in chancery, district of Washington, northern division.

EXHIBIT "B."

S. S. Bailey and wife to Alger & Hawley. } Deed and Agreement.

This indenture, made this 29th day of December, A. D. 1887, between Stephen S. Bailey and Jennie D. Bailey, his wife, of Spokane Falls, Washington Territory, the parties of the first part, and Russell A. Alger, of Detroit, Michigan, and Ravaud K. Hawley, of Cleveland, Ohio, the parties of the second part:

Witnesseth, that the said parties of the first part, for and in consideration of the sum of nine thousand five hundred and
114 twenty-eight and $\frac{5}{100}$ dollars, lawful money of the United States, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, and in consideration of the agreement of the said parties of the second part to pay to said parties of the first part the further sum of thirteen thousand three hundred and thirty-nine and $\frac{37}{100}$ dollars, in like money, according to the terms and conditions hereinafter expressed, do, by these presents, grant, bargain, sell, convey, and confirm unto the said parties of the second part, and to their heirs and assigns, the following-described tracts, lots, and parcels of land, situate, lying, and being in the counties of Skagit and Whatcom, Territory of Washington, and particularly bounded and described as follows, to wit: The southwest quarter of the southeast quarter; the east half of the southwest quarter; the southwest quarter of the southwest quarter; lots two (2), three (3), and four (4); the southwest quarter of the northeast quarter; the northwest quarter of the southeast quarter; the south half of the northwest quarter; the northwest quarter of the southwest quarter of section one (1); the east half of the east half of section two (2); the east half of the southeast quarter; the southwest quarter of the southeast

quarter; the north half of the north half; the south half of the northeast quarter; the southeast quarter of the northwest quarter; the northwest quarter of the southeast quarter; the southeast quarter of the northwest quarter; the northeast quarter of the southwest quarter; the west half of the southwest quarter; the southwest quarter of the northwest quarter of section twelve (12); the northeast quarter of the north-
115 east quarter; the northwest quarter of the northeast quarter; the north half of the northwest quarter of section thirteen (13), all in township thirty-six (36) north, of range three (3) east, of the Willamette meridian; lots two (2) and three (3); the east half of the southwest quarter of section seven (7); the northwest quarter of the southeast quarter; the northeast quarter of the northwest quarter; the west half of the northeast quarter of section eighteen (18), all in township thirty-six (36) north, of range four (4) east, of the Willamette meridian; the southeast quarter of the southeast quarter; lots one (1), two (2), and three (3) of section thirty-five (35), all in township thirty-seven (37) north, of range — (3) east, of the Willamette meridian.

Together with all the appurtenances, to have and to hold the said premises, with the appurtenances, unto the said parties of the second part, and to their heirs and assigns forever, subject to the following conditions, each and every one of which conditions the said parties of the second part covenant and agree with the said parties of the first part to perform, that is to say, whereas the said parties of the second part have this day purchased of the said parties of the first part the tracts and parcels of land hereinbefore described, for and at the price of twelve dollars per acre. And, whereas, the said parties of the first part have not yet delivered to said parties of the second part the United States patents to any of said tracts or parcels of land; and, whereas the said parties of the second part have paid the sum of five dollars per acre upon the said purchase price of
116 said land, and are desirous of withholding the balance of said purchase price, that is, the sum of seven dollars per acre, until said patents shall be delivered to them; therefore, said parties of the second part are, and by the acceptance of this deed, agree to pay to the said parties of the first part, whenever the United States patents of any one or more of said tracts shall be delivered to said parties of the second part, or their agent, in addition to the amount already paid, the sum of seven dollars per acre for the number of acres included in such tract or parcel, together with interest thereon at the rate of six per cent. per annum from this date until said principal sum is paid. And the said parties of the first part, their heirs, executors, and administrators, do by these presents covenant, grant, and agree, to and with the said parties of the second part, their heirs and assigns, that the said parties of the first part, their heirs, executors and administrators, all and singular the premises hereinabove conveyed, described, and granted or mentioned, with the appurtenances, unto the said parties of the second part, their heirs and assigns, and against all and every person and persons whomsoever, lawfully claiming or to claim the

same or any part thereof, shall and will warrant and forever defend, subject to the condition hereinbefore expressed.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

STEPHEN S. BAILEY. [SEAL.]
JENNIE D. BAILEY. [SEAL.]

117 Signed, sealed, and delivered in presence of—
THOS. T. LITTELL.
E. L. SHANNON.

TERRITORY OF WASHINGTON, } ss:
County of King, }

This is to certify that on this 29th day of December, A. D. 1887, before me, a notary public in and for Washington Territory, personally came Stephen S. Bailey and Jennie D. Bailey, his wife, to me known to be the individuals described in and who executed the within instrument, and personally acknowledged to me that they signed and sealed the same as their — and voluntary act and deed for the uses and purposes therein mentioned.

And the said Jennie D. Bailey, wife of the said Stephen S. Bailey, upon an examination by me, separate and apart from her said husband, after the contents of said instrument were by me made known to her, and she was by me fully apprised of her rights, and the effect of signing said instrument, did freely and voluntarily, separate and apart from her said husband, sign and acknowledge the same, acknowledging that she did voluntarily, of her own free will and without the fear of or coercion from her husband, execute the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[Thos. T. Littell, Notary Public, Washington Territory.]

THOS. T. LITTELL,
Notary Public in and for Washington Territory.

118 Filed for record at request of Eben Smith, Jan. 2nd, 1888, at 10 a. m. Recorded and record compared Jan. 2, 1888.
H. P. DOWNS,
County Recorder.

STATE OF WASHINGTON, } ss:
County of Skagit, }

I, H. Hammer, county auditor of the county of Skagit, State of Washington, do hereby certify that the annexed is a copy of deed and agreement wherein S. S. Bailey and wife are grantors, and Alger & Hawley are grantees, and that it is a true and literal exemplification and copy from the record as the same appears in volume 5 of Deeds at page 780, records of Skagit county, Wash.

In testimony whereof, I have hereunto set my hand and affixed

my official seal at Mt. Vernon in said county, this 20 day of July, 1896.

[Skagit County Auditor's Seal, State of Washington.]

H. HAMMER,
County Auditor of Skagit County, Washington.

(Endorsed:) Compl'ts' Exhibit "B." Eben Smith, United States master in chancery, district of Washington, northern division.

119 EXHIBIT "C."

B.
M. F. H. 4–207. L. Q. C. L.
J. A. D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 23, 1896.

I, E. F. Best, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of the papers filed with Olympia, Washington Territory, canceled, cash entry No. 7081, in favor of Henry C. Hackley, is a true and literal exemplification of the original papers on file in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[United States General Land Office Seal.]

E. F. BEST,
Acting Commissioner of the General Land Office.

(Endorsed:) Compl'ts' Exhibit "C." Eben Smith, United States master in chancery, district of Washington, northern division.

120 *Notice of Application to Purchase Timber Land.*

UNITED STATES DISTRICT LAND OFFICE,
OLYMPIA, WASHINGTON TERRITORY.

Notice is hereby given that, in compliance with the provisions of the act of Congress approved June 3, 1878, entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," Henry C. Hackley, of King county, Washington Territory, has this day filed in this office his application to purchase the N. W. ¼ of N. E. ¼ and N. ½ of N. W. ¼ of section No. 13, and S. E. ¼ of S. W. ¼ of section No. 12, in township No. 36 north, range No. 3 east of the Willamette meridian. Any and all persons claiming adversely the said described land, or any portion thereof are hereby required to file their claim in this office within sixty (60) days from date hereof.

Given under my hand, at my office in Olympia, W. T., this 29th day of January, A. D. 1883.

JOHN F. GOWEY,
Register of the Land Office.

LAND OFFICE AT OLYMPIA, W. T., *April* 2, 1883.

I, John F. Gowey, register of the land office, certify that the above notice was by me posted in a conspicuous place in my office during a period of sixty (60) days and over, I having first posted the same on the 29th day of January, A. D. 1883.

121 I further certify that there are no adverse claims to the land herein described known to this office.

JOHN F. GOWEY, *Register.*

Affidavit of Publication.

TERRITORY OF WASHINGTON, } ss:
County of Whatcom, }

James Power, being first duly sworn, on his oath, says: That he is the printer and the publisher of the Puget Sound "Mail," which is a weekly newspaper, and which, before and at the times hereinafter mentioned and included, was published at La Conner, in the county of Whatcom, and the Territory of Washington, at least once a week, as a weekly newspaper, and was, during all said time, of general circulation in the county of Whatcom; and that the legal notice, of which a printed copy is hereto attached, was published and advertised in full in said newspaper, by printing and publishing in said newspaper, and in every successive issue thereof, for ten consecutive weeks, a printed copy of said notice, which copy was always a precise counterpart and fac-simile of the printed copy attached hereto. And that the date of the first publication, as aforesaid, of said notice was on the 10th day of February, 1883, and the date of the last publication, as aforesaid, thereof was on the 14th day of April, 1883.

(Signed) JAS. POWER.

122 Sworn to and subscribed before me this 14th day of April, 1883.

[SEAL.] S. P. BROOKS,
Notary Public in and for Whatcom County, Washington Territory.

Henry C. Hackley.

Notice of Application to Purchase Timber Land.

Notice of final proof. Homestead App. No. —, Proc. D. S. No. —.

Notice of Application to Purchase Timber Land.

UNITED STATES DISTRICT LAND OFFICE,
OLYMPIA, WASHINGTON TERRITORY.

Notice is hereby given that, in compliance with the provisions of the act of Congress approved June 3, 1878, entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," Henry C. Hackley, of King county,

Washington Territory, has this day filed in this office his application to purchase the N. W. ¼ of N. E. ¼ and N. ½ of N. W. ¼ of section No. 13, and S. E. ¼ of S. W. ¼ of section No. 12 in township No. 36 north, range No. 3 east of the Willamette meridian.

Any and all persons claiming adversely the said described land, or any portion thereof, are hereby required to file their claims in this office within sixty (60) days from date hereof.

123 Given under my hand, at my office in Olympia, W. T., this 29th day of January, A. D. 1883.

JOHN F. GOWEY,
Register of the Land Office.

Feb. 10. 10 W.

McJ. 4–371.

(The testimony of two witnesses in this form, taken separately, required in each case.)

Testimony of Witness under Act of June 3, 1878.

W. W. HOLCOMB, being called as a witness in support of the application of Henry C. Hackley, to purchase the northwest quarter of northeast quarter and north half of northwest quarter of section No. 13, and southeast quarter of southwest quarter of section 12, township 36 north, of range 3, east, testifies as follows:

Q. 1. What is your post-office address, and where do you reside?

A. Seattle, King Co., Washington Territory.

Q. 2. What is your occupation?

A. Lawyer.

Q. 3. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?

A. Yes, I am.

Q. 4. When and in what manner was such inspection made?

A. I passed over it and examined it on the 17th day of April, A. D. 1883.

Q. 5. Is it occupied, or are there any improvements on it not made for ditch or canal purposes or which were not made by, or do not belong to, the said applicant?

124 A. There is not.

Q. 6. Is it fit for cultivation?

A. It is not.

Q. 7. What causes render it unfit for cultivation?

A. Very heavy growth of fir timber, the soil is unproductive as it is a mountainous region, gravelly and rocky.

Q. 8. Are there any salines, or indications of deposits of gold, silver, cinnebar, copper, or coal on this land? If so, state what they are, and whether the springs or mineral deposits are valuable.

A. There is not.

Q. 9. Is the land more valuable for mineral or any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone?

A. It is chiefly valuable for timber.

Q. 10. From what facts do you conclude that the land is chiefly valuable for timber or stone?

A. There is a heavy growth of good, merchantable timber, the soil unproductive, of no value, as it is gravelly, and rocky, and valueless.

Q. 11. Do you know whether the applicant has directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which he may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except himself?

A. I do not.

Q. 12. Are you in any way interested in this application, or in the lands above described, or the timber or stone, salines, mines, or improvements of any description whatever thereon?

A. I am not.

WAYNE W. HOLCOMB.

125 I hereby certify that witness is a person of respectability; that each question and answer in the foregoing testimony was read to him before he signed his name thereto, and that the same was subscribed and sworn to before me this — day of April, 1883.

[SEAL.] THOS. A. BATES,
Notary Public.

NOTE.—The officer before whom the testimony is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law:

Title LXX—Crimes, ch. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states and subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See § 1750.) (12664–25,000.)

126 (Endorsement:) Timber lands. Act of June 3, 1878. Testimony of witness. Land office at Olympia, W. T. Sections 12 and 13, township 36 N., range 3 E.

McJ. 4–371.

(Testimony of two witnesses in this form, taken separately, required in each case.)

Testimony of Witness under Act of June 3, 1878.

ALBERT LUNDEN, being called as a witness in support of the application of Henry C. Hackley, to purchase the N. W. ¼ of N. E. ¼ and N. ½ of N. W. ¼ of sec. No. 13, and S. E. ¼ of S. W. ¼ of section 12, township 36 N., of range 3 east, testifies as follows:

Ques. 1. What is your post-office address, and where do you reside?

Ans. Seattle, King county, Wash. Ter.

Ques. 2. What is your occupation?

Ans. Lumberman.

Ques. 3. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?

Ans. Yes, I am.

Ques. 4. When and in what manner was such inspection made?

Ans. I passed over it and examined it on the 17th day of April, A. D. 1883.

Ques. 5. Is it occupied, or are there any improvements on
127 it not made for ditch or canal purposes, or which were not made by, or do not belong to, the said applicant?

Ans. There is not.

Ques. 6. Is it fit for cultivation?

Ans. It is not.

Ques. 7. What causes render it unfit for cultivation?

Ans. Very heavy growth of fir timber; the soil is unproductive, as it is a mountainous region, gravelly and rocky.

Ques. 8. Are there any salines, or indications of deposits of gold, silver, cinnebar, copper, or coal on this land? If so, state what they are, and whether the springs or mineral deposits are valuable.

Ans. There is not.

Ques. 9. Is the land more valuable for mineral or any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone?

Ans. It is chiefly valuable for timber.

Ques. 10. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Ans. There is a heavy growth of good, merchantable timber. The soil is unproductive, and of no value, as it is gravelly and rocky, and valueless.

Ques. 11. Do you know whether the applicant has directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which he may acquire from the Government of the United States may inure, in whole or in part, to the benefit of any person except himself?

Ans. I do not.

128 Ques. 12. Are you in any way interested in this application, or in the lands above described, or the timber or stone,

salines, mines, or improvements of any description whatever thereon?

Ans. I am not.

ALBERT LUNDEN.

I hereby certify that witness is a person of respectability; that each question and answer in the foregoing testimony was read to him before he signed his name thereto, and that the same was subscribed and sworn to before me this 25th day of April, 1883.

THOS. H. BATES,
Notary Public.

NOTE.—The officer before whom the testimony is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law:

Title LXX—Crimes, ch. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states and subscribes any material matter which he does not believe to be true, is
129 guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See sec. 1750.)

(12664–25,000.)

(Endorsement:) Timber lands. Act of June 3, 1878. Testimony of witness. Land office at Olympia, W. T. Section- 12 and 13, township 36 N., range 3 E.

McJ. (4–062.)

Non-mineral Affidavit.

COUNTY OF KING, } ss:
Ter. of Washington, }

Henry C. Hackley, being duly sworn according to law, deposes and says that he is the identical person who is applicant for Government title to the N. W. ¼ of N. E. ¼ and N. ½ of N. W. ¼ of sec. 13, and S. E. ¼ of S. W. ¼ of sec. 12, township No. 36 N., R. 3 E., of W. M.; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his knowledge of said land is such as to enable him to testify understandingly with regard

thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnebar, lead, tin, or copper, or any deposit of coal;
130 that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes.

HENRY C. HACKLEY.

Subscribed and sworn to before me this 23 day of April, A. D. 1883, and I hereby certify that the foregoing affidavit was read to the said H. C. Hackley previous to his name being subscribed thereto; and that deponent is a respectable person to whose affidavit full faith and credit should be given.

[SEAL.] THOS. H. BATES,
Notary Public.

(11515–30 M.)

McJ. (47537.)

Sworn Statement under Act of June 3, 1878.

LAND OFFICE AT OLYMPIA, WASH. TER.,
January 29th, 1883.

I, Henry C. Hackley, of King county, Washington Territory, desiring to avail myself of the provisions of the act of Congress
131 of June 3, 1878, entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory," for the purchase of the northwest ¼ of northeast ¼ and the north ½ of the northwest ¼ of sec. No. 13 and the southeast ¼ of the southwest ¼ of section No. 12, township 36 north, of range three (3) east Will. mer. do solemnly swear that I* am a native-born citizen of the United States and over twenty-one years of age; that the said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, or coal; that I have made no other application under said act; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit; and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title which I may acquire from the Government of the

* In case the party has been naturalized, or has declared his intention to become a citizen, a certified copy of his certificate of naturalization or declaration of intention, as the case may be, must be furnished.

United States may inure in whole or in part to the benefit of any person except myself.

HENRY C. HACKLEY.

Sworn to and subscribed before me this 29th day of January, 1883.

JOHN L. GOWEY,
Register of the Land Office.

132 (Endorsement:) Timber lands. Act of June 3, 1878. Sworn statement. Land office at Olympia, Wash. Ter. Secs. 12 & 13, township 36 north, range 3 east.

P. O. Seattle, W. T.

McJ. No. 7081.

RECEIVER'S OFFICE AT OLYMPIA, W. T., *April 30th*, 1883.

Received from Henry C. Hackley, of King county, Wash. Ter., the sum of four hundred dollars and — cents; being in full for the S. E. ¼ of S. W. ¼ of section 12, and N. W. ¼ of N. E. ¼ and N. ½ of N. W. ¼ quarter of section No. 13, in township No. 36 north, of range No. 3 east, containing 160 acres and — hundredths, at $2.50 per acre. (Red ink.) Act June 3, 1878. Timber lands.

ROBERT G. STUART, *Receiver.*

Reg. and rec'r's fees $10 paid.
$400.*

McJ. No. 7081.

LAND OFFICE AT OLYMPIA, W. T., *April 30th*, 1883.

It is hereby certified that, in pursuance of law, Henry C. Hackley, residing at ——, in King county, *State of* Wash. Terr. en*
133 this day purchased of the register of this office the N. W. ¼ of N. E. ¼ & N. ½ of N. W. ¼ of sec. No. 13 and S. E. ¼ of S. W. ¼ of section No. 12, in township No. 36, north of range 3 E. of the Will. principal meridian, W. T., containing 160 acres, at the rate of $2 $\frac{50}{100}$ dollar and — cents per acre, amounting to $400 *dollars* and — cents, for which the said Henry C. Hackley has made payment in full as required by law.

Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Henry C. Hackley shall be entitled to receive a patent for the lot above described.

JOHN F. GOWEY, *Register.*

(3182–50 M.)

(Across face in red ink:) Nov. 21, '93. Entry canceled. (F. H. J.) J. R. M., chief Div. P.
(Black ink:) Canceled.
(Endorsed:) (4–189.) "H." No. 7081. Div. C. List No. 67.

*Sic.

Cash entry. Land office at Olympia, W. T. Sec. 12 & 13, town 36 N., range 3 east. Aug. 9, '88. Entry held for cancellation. A. W. S. Nov. 15/88. Hearing ordered. H. H. J. Jan. 20/91, to R. & R. Entry held intact. Att'ys advised. G. W. C. Entry to Div. "C." J. R. M., chief Div. P., '93. 107,389. Nov. 21/93. See to R. & R. Entry canceled. M'ch 14, '94, to R. & R.; case closed. Papers to "C." F. H. O., Jr. J. R. M., chief Div. P. Canceled.

134 (Endorsement on back exhibit:) Canceled. No. 7081. L. O. Seattle, Wash. Name, H. C. Hackley. Tract, N. W. ¼ N. E. ¼, N. ½ N. W. ¼, sec. 13, S. E. ¼ S. W. ¼, sec. 12, T. 36 N., R. 3 E. Cause of cancellation: Fraud. Cancelled November 31, 1893, and purchase-money refunded per report. No. —. No patent to issue hereon.

EXHIBIT "D."

UNITED STATES OF AMERICA:

(Arms.)

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *June* 26, 1896.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original as it appears of record in this department.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[Seal Department of the Interior.]

(Signed) WM. H. MILLS,
Acting Secretary of the Interior.
E. W.

Marked: Compl'ts' Exhibit "D." Eben Smith, United States master in chancery, district of Washington, northern division.

135 1441–1891.

V. B. DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 19, 1893. W. M. W.

UNITED STATES
vs.
STEPHEN S. BAILEY ET AL.

The Commissioner of the General Land Office.

SIR: By departmental letter of January 31, 1891, your office was directed to transmit to this department the papers in the matters of the timber-land entries of Henry McBride and others made at the land office at Seattle, Washington, in which your office rendered a decision on January 20, 1891, allowing said entries to remain of record. The reason for this action is found in the following quotations from said departmental letter, viz:

Among the questions passed upon in said decision, as I understand, was that as to the character of the land covered by the several entries, namely, whether they were lands properly subject to entry under the timber-land act of June 3, 1878. Inasmuch as this question has recently been before the department, and as entries made under the law above mentioned and involving the same question, are now pending, and it being apparent that
136 the entries acted upon by your said office decision of the 20th instant cover a large area of land, and involve interests important to the Government, I deem it advisable to direct that you forward the record in the several cases adjudicated by said decision for my personal examination and consideration.

The papers were duly transmitted in accordance with said directions, and have been carefully examined and the questions presented have been considered.

The entries and lands involved are as follows:

Henry McBride, No. 7363, July 6, 1883, lots 2 and 3, and S. W. ¼ of the N. E. ¼, and N. W. ¼ of the S. E. ¼, sec. 1, T. 36, N. R. 3 E., land transferred to J. Theodore Lohr, July 23, 1883, and on the same day by him to Stephen S. Bailey.

William Gilmore, No. 7104, May 4, 1883, lot 4 and S. ½ of the N. W. ¼, and N. W. ¼ S. W. ¼, sec. 1, T. 36, N. R. 3 E., land transferred to Bailey, April 30, 1883.

Edwin L. Chalcroft, No. 6939, March 12, 1883, S. W. ¼ of the S. E. ¼, and the E. ½ of the S. W. ¼ and the S. W. ¼ of the S. W. ¼, sec. 1, T. 36 N., R. 3 E., land transferred to Bailey, March 13, 1883.

Henry H. Stanley, No. 6975, March 27, 1883, E. ½ of the N. E. ¼ and E. ½ of the S. E. ¼, sec. 2, T. 36 N., R. 3 E., land transferred to Gilmore April 30, 1883, and by him to Bailey on the same day.

Edward Crome, No. 6938, March 12, 1883, S. ½ of the N. E.
137 ¼, the S. E. ¼ of the N. W. ¼ and the N. W. ¼ of the S. E. ¼, sec. 12, T. 36 N., R. 3 E., land transferred to Bailey March 14, 1883.

Henry Brandon, No. 6936, March 12, 1883, N. ½ of N. E. ¼ and the N. ½ of the N. W. ¼, sec. 12, T. 36 N., R. 3 E., land transferred to Bailey, March 14, 1883.

Winfield S. Wilson, No. 7500, August 13, 1883, S. E. ¼ of the S. E. ¼ and lots 1, 2 and 3, sec. 35, T. 37 N., R. 3 E., land transferred to Bailey, August 15, 1883.

Wayne W. Holcomb, No. 7071, April 26, 1883, N. E. ¼ of the S. W. ¼, the W. ½ of the S. W. ¼ and S. W. ¼ of the N. W. ¼, sec. 12, T. 26 N., R. 3 E., land transferred to Bailey, April 26, 1883.

Henry C. Hackley, No. 7081, April 30, 1883, S. E. ¼ of the S. W. ¼ of sec. 12, and N. W. ¼ of the N. E. ¼ and N. ½ of the N. W. ¼, sec. 13, T. 36 N., R. 3 E., land transferred to Bailey, April 30, 1883.

John E. Brandon, No. 6937, March 12, 1883, E. ½ of the S. E. ¼ and S. W. ¼ of the S. E. ¼, sec. 12, and N. E. ¼ of the N. E. ¼, sec. 13, T. 36 N., R. 3 E., land transferred to Bailey, March 14, 1883.

William L. Rogers, No. 6999, March 31, 1883, lots 2 and 3, and E. ½ of the S. W. ¼, sec. 7, T. 36 N., R. 4 E., land transferred to Gilmore, April 18, 1883, and by him to Bailey, April 30, 1883.

John L. Leslie, No. 7424, July 19, 1883, N. E. ¼ of the N. W. ¼, W. ½ N. E. ¼ and N. W. ¼ S. E. ¼, sec. 18, T. 36 N., R. 4 E., land transferred to Bailey, July 21, 1883.

It also appears that Bailey transferred all of the lands embraced by said entry to Russell A. Alger and Ravaud K. Hawley,
138 the present claimants, by warranty deed dated December 29, 1887, for the price of $12 per acre, $5 in cash and balance to be paid when Bailey should furnish a patent from the United States.

In July, 1888, Special Agent Carson of your office made a report in regard to each of said entries, recommending that each of them be held for cancellation because made in the interest of third parties, and because the land was agricultural in character and not subject to entry under the act of June 3, 1878 (20 Stat., 89). You thereupon held the entries for cancellation allowing the parties sixty days within which to apply for a hearing.

The transferees of said entryman appeared at the local office within the time specified and entered a motion to dismiss all proceedings against said entries, upon the ground that your office had no jurisdiction over an entry after the issuance of a final receipt, and at the same time filed an application for a hearing, expressly reserving all rights under the motion to dismiss. Said motion was denied, and a hearing was directed and had before the local officers beginning August 27, and continuing until November 30, 1889; all said cases being by stipulation consolidated, and tried and considered as one case. In addition to the question of fraud in making these entries, and that as to the character of the land, the transferees asserted again that there was no jurisdiction to investigate or authority to cancel an entry after issuance of final certificate, and further, that they were entitled to protection as innocent purchasers. The register, in quite a long opinion, decided against the defendants on those two points, against the Government on the
139 question of fraud in making said entries, and that part of the land was agricultural, specifying the tracts, and part of the character prescribed by the act of June 3, 1888. The receiver held that the transferees were entitled to protection as *bona fide* purchasers, and that the entries should be passed to patent. You decided adversely to the defendants on the question of jurisdiction, did not specifically pass upon their claim for protection as innocent purchasers, held adversely to the Government as to the question of fraud and as to the character of the land.

That this department had jurisdiction over these entries until the issuance of patent is a proposition so frequently asserted in the decisions that it is unnecessary to discuss it at this time.

The following cases may be referred to as embodying the views of this department on that question: Smith *v.* Custer *et al.* (8 L. D., 269); Travelers' Insurance Company (9 L. D., 316); United States *v.* Montgomery (11 L. D., 484); United States *v.* Miller (14 L. D., 617).

The contention that transferees of this class of entries are entitled to protection as innocent purchasers has been strenuously asserted in other cases and recently considered by this department. It was

then concluded that such transferees occupied the same position and are to be treated the same as transferees of lands covered by entries under the pre-emption law, the cases of Smith *v.* Custer *et al.*, *supra*, and Travelers' Insurance Company, *supra*, being cited to show the rulings of the department upon that class of cases. U. S. *v.* Allard *et al.* (14 L. D., 391); U. S. *v.* Miller, *supra*.

140 The testimony of six witnesses, as to the character of the land, was introduced on the part of the Government. They testified that the land covered by said entries, if cleared, would be fit for cultivation, and would produce valuable crops by the ordinary methods of farming in the State of Washington. They place the value of the lands generally at from $400 to $500 per acre, when cleared, and they base their judgment as to such value upon their conclusions that said lands will produce crops worth about $50 per acre each year, after paying expenses of cultivation. They concede that there is a considerable amount of timber on most of the land, and that the lands would not be worth anything for agricultural purposes until cleared of the natural growth of timber on it.

The transferees introduced eleven witnesses whose testimony tended to show that said lands, with the exception of the entry of Rogers, are covered with valuable timber; some of them testified that the lands, if cleared, would not be fit for cultivation; that it would cost from $200 to $500 per acre to clear the land, and that the land is chiefly valuable for its timber.

Taking all of the evidence in the case together, as to the character of the lands in question, it may by true that the greater part of them might very properly be held to be subject to entry under the timber and stone act of June 3, 1878 (20 Stat., 89); yet, it is entirely reasonable to conclude that the land which will produce agricultural crops of the value of $50 net per acre each year could

141 not, in the very nature of things, be chiefly valuable for the timber standing upon it in its natural state.

In view of the conclusion I reach upon the whole case, I deem it unnecessary to pass upon the character of the land in controversy at this time, but prefer to remit this question entirely to the future when it may or may not arise.

The paramount and controlling question in the case, applicable alike to all these entries, is: Were they made in good faith for the benefit of the respective entrymen, or were they fraudulently made for, and in the interest of, another or others? The fraud charged in connection with these entries is that they were made at the instance and for the benefit of Stephen S. Bailey and J. Theodore Lohr, to whom the lands were sold and conveyed, one tract before, and the other soon after, the entries were made.

The Government offered no testimony-in-chief to support the allegations that said entries were made in the interest of said transferees, other than what might reasonably be inferred from the records, showing dates of said entries and transfers thereof.

These entries were all transferred to said Stephen S. Bailey. On December 29, 1887, Bailey sold and conveyed, by warranty deed, all of the land embraced in said entries to Russell A. Alger and

Ravaud K. Hawley, the present claimants, for the price of $12 per acre; $5 in cash, and the balance to be paid when a patent should issue. There is no charge, nor is there any testimony affecting the transaction between Bailey and Alger and Hawley.

142 The first witness for the transferees, J. Theodore Lohr, testified, on cross-examination, that prior to coming to Washington, in 1882, he had been employed in "locating people on Government lands, and buying and selling timber lands and farming lands;" that he had dealt more in timber than agricultural land, and usually received $50 for each claim located; that he had located between fifty and sixty persons in Washington Territory since he went into said business (Ev., p. 808); that the Henry McBride, Chalcraft, Henry E. Brandon, Crone, Holcomb, and Hackley claims were located by him; that he gave Gilmore description of his claim; also the Leslie claim (Ev., p. 809); that he did not give description of the Rogers claim, but thinks he gave descriptions of the Stanley and Wilson claims. Lohr also testified that in the winter of 1882, and spring and summer of 1883, his headquarters were in Seattle, and that the first part of the time he boarded at the New England hotel, of which said Bailey was proprietor; that he located said parties in 1882, and at the time some of the locations were made was personally acquainted with said Bailey; that his acquaintance with Mr. Bailey was "after most of these entries were located;" "that he knew Bailey on January 1, 1883, and located McBride some time in 1883, but does not remember what part of the year;" that he first knew McBride in 1882 at La Conner; that he was known as a land locator, and gave McBride description, and was afterwards requested by him to show him over the claim some time in the summer of 1883; that he told McBride he

143 would charge him $50 or $100 for locating his entry; that he located McBride in one day; that after coming back from examining the claim, witness bought said claim, but does not remember being in Olympia on or about June 22, 1883, and does not know who paid the money for the McBride entry; that witness frequently went to the land office, and parties sent their money by him to pay for their claims, after having made final proof, but does not remember taking any money for the McBride entry. (Record, p. 814.)

Lohr also swears that the money to pay for the McBride entry was not given to him by S. S. Bailey (Record, p. 815); that when he got the duplicate receipt for parties he turned them over to them; that he had no understanding with McBride in the month of June, 1883, relative to the purchase of his entry, other than what he had with all parties whom he located; that he agreed to buy any claim located by him after the entrymen had obtained title, if he wanted to sell, and would pay more than any one else (Record, p. 816); that he could do this because it would save an examination of the claim, and he agreed usually to give $50 more than any one else would give, which promise was given "as an inducement for the parties to take my (his) word and knowledge as being good as to the quality and quantity of timber" (Record, p. 817); that noth-

ing was said about paying the expenses of locating and examining the land or the land-office fees outside of the purchase price; that the agreement with McBride for his claim was made on July 23, 1883, and not before (Record, p. 821); that he sold the McBride claim to S. S. Bailey in the fall or summer of 1883.

144 Lohr further swears that he had an agreement with said Bailey in the spring of 1883 to the effect that he would invest in lands where witness thought there was a good bargain; that Bailey would furnish the money to buy the land, provided he, Lohr, would attend to the buying and selling, and the profits growing out of the sale should be shared between them (Record, p. 834); that said agreement was verbal only, and Mr. Bailey carried out his part thereof; that witness did not locate these entries in pursuance of this agreement; that he does not remember ever having loaned any of these entrymen any money, but it is probable that he did; that he remembers having made an affidavit in June, 1888, before Special Agent Carson, relative to said entries, but cannot say just what it contained (Record, p. 826); that when he carried money to entrymen he sometimes took notes and sometimes trusted to their honor; that no note that witness ever received "shows anything else but the amount of money he received" (Record, p. 826).

Witness further swears that he was more or less acquainted with the other entrymen in 1883, some only by sight; that John Brandon was employed in the New England hotel, and some of the others were stopping there.

On redirect examination, Lohr testified that in 1882 and 1883 timber lands were most sought after in Washington (Record, p. 850); that there was no agreement or contract with any of said entrymen, or between the entrymen and any other party, so far as witness knows, "that after the said final entry the party would sell to 'witness' at any specified price, or at all;" that Wayne W.

145 Holcomb is an attorney-at-law, and had been representative to the legislature from Yakima county, in said State; that said Chalcraft was a civil engineer in Seattle, Gilmore was a merchant at Edison, Skagit county, in said State, McBride was a school teacher, and now an attorney-at-law, all men of good character (Record, p. 853); that McBride asked witness to give him a location as a timber claim, and he did so.

On recross-examination Lohr said that he was not asked as to legal requirements, and took it for granted that McBride knew that he "should not make his entry for the benefit of any other person but himself" (Record, p. 855); that Henry Brandon was engaged in driving a delivery wagon for Schwabacher Bros., of Seattle, and is a brother of John E. Brandon, and does not know as to his means (Record, p. 857); that he was an honorable, trustworthy young man; that Edward Crome was an assistant surveyor, and might have been employed in the New England hotel in the summer of 1883; that said Wilson was engaged in a restaurant in Seattle; that said Hackley assisted in surveying, and was afterwards a contractor on a road near Lake Washington; that said Rogers was a

farmer at Edison; and said Leslie worked in a barrel factory in North Seattle (Record, p. 858).

In the examination on the Gilmore entry, on cross-examination, witness said that he bought provisions from Gilmore, and advised him, the same as he would any other friend, to use his timber rights and secure timber lands, as they would be very valuable in the
146 future; told him, between April 23 and April 30, 1883, that he could sell his claim to S. S. Bailey, and conducted the negotiations for the purchase of the land for Mr. Bailey (Record, p. 872); that Gilmore said that he was the owner of the Stanley and Rogers claims, and if he sold one, must sell all, or words to that effect; that witness remembers that Mr. Bailey told him about a year ago that the United States claimed that Gilmore sold to him before he purchased from the Government, and that Mr. Gilmore was willing to rectify by giving another deed (Record, p. 875). Witness further swears that he had no interest in the lands deeded by Gilmore to Bailey (Record, p. 876); that his interest was not in the lands, but in the profits after the lands were sold (Record, p. 878).

In the redirect examination, on the Chalcraft entry, witness swears that there was no contract between said entryman and him, or with any other person, so far as he knows, for the purchase or sale of the land embraced in his timber entry, and prior to the receipt by him of the land-office receipt for the land (Record, p. 903).

Lohr further swears that he made H. Brandon the same offer as to others, relative to the purchase of his claim after procuring title (Record, p. 907).

In reference to the Crome entry, witness states that he might have loaned the entrymen money to pay for his entry, but it was not with any understanding that that witness was to become the purchaser after final proof; that this was done as an accommodation, and the land was sold to Bailey in the spring of 1883 (Record, p. 920).

147 Witness conducted the negotiations for the sale of the Stanley and Rogers entries from Gilmore to Bailey, until the price was agreed upon (Record, p. 930), and did the same with the Holcomb entry (Record, p. 938).

On cross-examination, relative to the Wilson entry, Lohr testifies that the entryman was working in a restaurant, as waiter or bartender, owned by Anderson & Ford, and the witness conducted the negotiations for the sale of his land to Bailey, but does not remember whether he loaned Wilson the money to pay for his entry or not (Record, p. 946).

Witness also conducted the negotiations for the purchase of Hackley's entry, but made no agreement prior to April 30, 1883, the date of his entry (Ev., 954). Witness also said, on cross-examination, that John E. Brandon was employed as a porter at the New England, and was also engaged in working at surveying; that witness concluded the negotiations for the sale of his entry to Mr. Bailey for $605.50 (Ev., 605). Witness also swears that he located the Leslie entry, was slightly acquainted with Leslie in 1883, and re-

ceived from him the sum of $50, for service in location (Ev., 989); that he negotiated for the sale of said entry to Bailey for the sum of $573; that he does not remember when Leslie made his final proof, and the negotiations were doubtless on the day of the sale (Ev., 992).

After testifying as to each smallest legal subdivision of said entries, witness was further questioned, in general, and stated that in the years 1882 and 1883 there were no settlers or settlements
148 in townships 36 and 37 north, ranges 3 and 4 east, and no improvements in the way of wagon roads or railroads (Evidence, 996); that he received no compensation from said entrymen for sale of their land, and none was promised him by them (Evidence, 1061); that each entryman was at liberty to sell to any one after the completion of his entry (Evidence, 1003).

On general cross-examination, witness was handed an affidavit purporting to have been made by him in June, 1888, relative to his transactions with said Bailey, and he admitted that he signed the name, and that the substance was correct (Evidence, 1006). When his attention was called to the statement in said affidavit that "some of these men gave me a note for the $50 that I was to receive for locating them, and in those cases the notes specified that in case they desired to sell the land after making final proof, that I would surrender them the notes, or that they were to be null and void in case I bought their lands," and he was asked why he had testified that the notes contained no stipulations relating to the disposition of said lands, he answered that the affidavit was drawn up in a hurry, and was signed by him without proper perusal; that he did not understand in his conversation that these stipulations were mentioned in the notes taken by him; that his "impression was that they were verbal considerations, or verbal understanding, as a matter of showing my (his) good faith in what I had stated to them. After re-reading this affidavit, I find that these are supposed to have been included in the notes as a part of the writing,
149 which I do not remember of as being facts" (Evidence, 1006–'7). He also states that Mr. Bailey asked him to testify in this case, and agreed to pay all of his expenses (Evidence, 1008).

Witness was asked the following question: "Did it occur to you, when you were locating these entrymen, and subsequently buying up their claims for the mutual benefit of S. S. Bailey and yourself, that you were operating in direct violation of the spirit of the timber law?" And he answered: "I did not believe that I was violating any law any more than I would buy locations made by other parties, so long as I used due diligence in making purchases when parties had the right to sell according to the advice given me" (Ev., 1010).

Witness also said that he had been paid by Mr. Bailey his full share in the profits arising from the sale to Hawley and Alger, and had no interest in the result of the trial (Ev., 1012).

On redirect examination, Lohr states that the special agent wrote said affidavit, and he only "skimmed over the first part of it, but took it for granted it was representing what was understood by the

conversation at that time;" that there was evidently a misunderstanding, on the part of the special agent, as to what he said about the contents of the notes given him by persons whom he located.

In addition to these facts and circumstances, it must be remembered that Agent Carson had reported these entries as fraudulent; that none of the entrymen were called as witnesses for the transferee, nor was Bailey sworn or offered as a witness in his own behalf.

150 I have thus stated in detail, and at unusual length, the evidence relating to the alleged fraudulent character of these entries in the transactions between Bailey and the entrymen, for the purpose of making clear the grounds upon which my conclusion is based. At every point Mr. Bailey appears; the conveyances were made to him very shortly after the entries were made; he advanced the money to make the entries in most, if not in all, cases; he was a hotel-keeper; Lohr was to select the lands, find the persons to make the entries, locate them thereon, and Bailey was to pay the expenses; upon the purchase of the land Bailey was to receive a deed for the tract, and Lohr and Bailey were to divide the profits between them. Lohr says this is so in his affidavit, although it is true he seeks to avoid it when he is put on the witness stand.

All the circumstances satisfy my mind that this was the arrangement. Lohr picked up clerks, bartenders, grocerymen, school teachers, lawyers, in a word anybody who was willing to make the location, or be concerned in it, for a consideration. They were mostly young men without any permanent abiding place. It is very strange, indeed, if they entered that land for their exclusive use and benefit, that they should have conveyed it to Mr. Bailey on the same day that the entries were made, or within a day or two thereafter, when the evidence shows that he was engineering these entries from the time the parties made the first affidavit until they submitted their final proof in support of their entries. It is very

151 plain to my mind that this was a scheme put up in the first instance by Lohr and Bailey for the purpose of acquiring title to the land for speculative purposes. To my mind this raises an impassable barrier, if the law is to be observed to the sustaining of these entries.

The purpose and intent of the act was to give every citizen of the United States, or one who has declared his intention of becoming such, the opportunity to purchase one hundred and sixty acres of land under said act, if it was unfit for cultivation, but in every case the entryman is required to act in good faith. But none of the entrymen at the time they made these purchases did so in good faith, in harmony with the spirit and letter of the law.

This holding in nowise conflicts or interferes with the right of a purchaser in good faith of land under the act, after he acquires title, to sell the land if he desires so to do. Sales made soon after purchase, however, if unexplained, have a tendency to arouse suspicion in the mind that when the entry was made it was not for the entryman's own exclusive benefit and use. And when we find

twelve entries made in the manner in which these were made, money furnished by the assignee, engineered by the assignee, deeded to the assignee, and this arrangement made prior to the time the locations were made, I do not see any escape from the conclusion that they were made in violation of the statute, and ought not to stand.

These views do not in any manner conflict with any of the doctrines announced by the Supreme Court in the case of United States *v.* Budd (144 U. S., 154). In that case patent had issued; the
152 Government was undertaking to set aside the patent on the ground of fraud, and the court lays down the rule that after the issuance of patent the Government must make a much stronger case in order to cancel an entry than before patent; that prior to the issuance of patent the matter is in the hands of the Land Department, and its findings on questions of fact are generally conclusive.

The court says:

But, after all, the question is not so much one of law for the courts after the issue of patent as of fact, in the first instance, for the determination of the land officers.

The courts do not revise their determination upon mere questions of fact. In the absence of fraud or some other element to invoke the jurisdiction and powers of a court of equity, the determination of the land officers as to the fact whether the given tract is or is not fit for cultivation is conclusive.

In that case there was the testimony of two witnesses denying the charge that Budd had made a prior agreement with Montgomery, that is, Budd and Montgomery each filed sworn answers denying specifically the existence of any such prior agreement, and an answer, under oath, in an equity case, when called for, as it was in that case, is always to be taken as evidence.

Moreover, in that case, the court eliminated from the record all the testimony going to show that the purchaser from Budd had made similar purchases in collusion with other entrymen at the same time and in the same vicinity, which left the Government with practically no evidence showing fraud.

153 In the case at bar, by stipulation, all these cases were to be tried as one, and the testimony touching all these transactions was, through this agreement, admissible and admitted in the trial of this case.

It is charged, among other things, that these entries were made on speculation, and not in good faith by the several entrymen, for the purpose of appropriating the same to their own use and benefit, and yet the purchaser failed at the trial to testify himself or to introduce any of the entrymen from whom he purchased.

It cannot be said in this case, as in the case of Budd, that the Government had the right to cross-examine the transferee or the entrymen, because none of them were produced as witnesses at the trial, and there was no power on the part of the Government to compel their attendance. Their testimony could only be obtained by their voluntary appearance and offering themselves as witnesses, which no man is willing to do when his testimony, truthfully given,

will show that he has obtained valuable property in violation of law. The case of Budd was tried in court, where these unwilling could be compelled to appear and give their testimony.

It is true that since the case has been pending here and very recently, Bailey has offered to testify therein and submit himself to cross-examination. His affidavit as to what his evidence would be, accompanying this offer, shows that he is prepared to make a denial of any wrongful act in connection with said entries. An affidavit to the same effect, sworn to on June 18, 1891, was already in the record, and therefore the offer was declined. Considering
154 this denial, and giving to it the utmost force and effect, it utterly fails to meet and overcome the preponderating adverse evidence in the record.

Whilst this tardy offer of Bailey, to some extent, may mollify the just criticism made because of his failure to testify in the case at all, the fact remains that the evidence of the entrymen is entirely wanting.

The Government cannot be charged with laches in not having their testimony in the record. It cannot therefore be said, as in the case in the Supreme Court:

If the Government, the complaining party, failed to call them, it is to be presumed that upon inquiry it found that they knew nothing that would tend to substantiate its claim.

On the other hand, if these men made their entries for their own use and not on speculation, or in collusion with Bailey, there was every inducement on his part to call upon them, and every moral obligation on their part to respond. They were peculiarly his witnesses; their testimony, in connection with his own, could alone overcome the damaging disclosures of Lohr, and if they were men of good character, as claimed by him, so much the more effective would their testimony have been to show a lack of interest or collusion on his part.

The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since
155 it raises strong suspicion that such evidence, if adduced, would operate to his prejudice (Starkie on Evidence, vol. 1, p. 54).

There is another clear distinction between the inquiry herein for consideration and the matter at issue in the case of The United States *v.* Budd. In that case the patent to Budd was sought to be set aside because of an alleged conspiracy between Budd, the entryman, and Montgomery, the purchaser. That is to say, the only matter considered by the court in that case, aside from the character of the land, was, whether the entry of Budd was made in collusion with or in the interest of Montgomery.

In the language of Justice Brewer, who delivered the opinion of the court:

The particular charge is that Budd, before his application, had unlawfully and fraudulently made an agreement with his codefend-

ant, Montgomery, by which the title he was to acquire from the United States should inure to the benefit of such codefendant.

The question as to whether Budd's entry was made in faith to appropriate it to his own use and benefit, and not on speculation, appears not to have been in issue further than that inquiry would necessarily be raised by an investigation confined to Montgomery's connection with the alleged fraudulent entry.

To entitle one to make a timber-land entry and purchase he is required to make oath: First, that he does not apply to purchase on a speculation, but in good faith to appropriate the timber to his exclusive use and profit; and second, that he has not, directly
156 or indirectly, made any agreement or contract, in any way or manner, with any person or persons, by which the title which he might acquire from the United States should inure, in whole or in part, to the benefit of any person except himself.

These requirements of the oath are separate and distinct. The entryman could comply with the one and violate the other, and a violation of either requirement would defeat the entry. For instance, if a person should make an entry for the purpose of speculation, although he might not offer to sell until after he should receive his final certificate of purchase, yet his entry should be forfeited; and, if a person should make entry in good faith, and with no speculative purpose or intention whatever, but if, before receiving final certificate, he should make an agreement or contract to sell, his entry should be forfeited.

The Supreme Court, in the case of United States *v.* Budd, dealt mainly with one of these requirements of the oath of the entryman—to wit: That the entryman had not sold, or agreed to sell, the land entered by him in violation of the statute. The other requirement of the oath referred to, that the entryman had not applied to purchase on a speculation, was considered by the court only as it threw light on the main and only real question in that case, to wit: Whether a contract or agreement to sell had been made by the entryman that would work a forfeiture of his right to purchase. As a distinct question, affecting the right of the entryman to purchase, the court did not consider the question here made, that
157 the entry originally was for a speculative purpose, whether he had or had not made a contract for the sale of the land to another.

It is clear, therefore, that the case of United States *v.* Budd does not decide the question now under consideration.

Now, if it should be conceded in the cases before me that the testimony of Lohr is insufficient to show that these several entries were made in the interest of, or in collusion with, Bailey, it seems to me the conclusion cannot be avoided that they were made on speculation, and not in good faith to appropriate the lands thus entered to the exclusive use and benefit of the several entrymen.

Lohr shows by his testimony that these several entrymen were engaged in different pursuits, and were induced by him to make these purchases, he telling them that he would buy their claims and give them fifty dollars more than any one else would; that this

promise was made to the parties as an inducement to take his word and knowledge as to the quality and quantity of the timber, and that while he does not remember loaning any of these entrymen money yet it — probably he did; that when he did so, he sometimes took notes and sometimes trusted to their honor. By this and other similar testimony he leaves no doubt in my mind that he procured these entries to be made purely on speculation; that none of these entries were made for the purpose of appropriating the land or timber to the use of the entrymen, but on the promise or representations of Lohr that such act on their part would re-
158 sult in a profitable speculation—that is, they would be able to make an immediate sale of the land at a price greatly in excess of the cost to the entrymen.

Entries made in this way and for this purpose are in violation of the spirit and letter of the law; for the applicant to purchase is required to make affidavit that "he does not apply to purchase the same on speculation."

This interpretation of the statute does not imply that a timber-land entryman is not authorized to sell his entry at any time he may choose after he has made his proof and received his certificate; but when, as in these cases, it is clearly shown that prior to taking any steps to secure the land, they had first satisfied themselves that these entries could be sold at a profit, and thereupon they made their entries for the sole purpose of securing the profit thus in view, to my mind they bring themselves within the inhibition of the statute.

Can it be doubted from all the records in this case that these entries were so made? I think not.

Mr. Bailey's connection with these purchases may be eliminated from the case, and the acts and motives of the entrymen alone considered, and their entries cannot be sustained if any meaning is to be given to that part of the statute which forbids the making of such entries "on speculation."

I am aware that in the case of The United States *v.* Budd the court used language indicating that nothing short of an actual prior agreement to sell can disturb the entry. But it must be remembered that, in that case, a "prior agreement to sell" was the
159 sole issue of fraud on trial, and, when Justice Brewer announced that "all it (the law) denounces is a prior agreement," etc., the language must be considered with reference to the matter at issue—namely, whether there was such an agreement between Budd and Montgomery.

Here the Government is inquiring into all matters connected with these entries, and is not limited, as in that case, to the issues made by the pleadings.

The decision of your office sustaining these entries is reversed, and you are directed to cause said entries to be cancelled. The papers in the case are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

(Endorsed:) Proofs and testimony. Filed July 29, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

160 In the United States Circuit Court for the District of Washington, Northern Division, Holding Terms at Seattle.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Notice.

To F. S. Griffith, Esq., solicitor for the above-named defendant:

You are hereby notified that the above-entitled cause is to be called on for argument in the above-entitled court before the Honorable C. H. Hanford, a judge of said court, on Monday, the third day of August, 1896, at ten o'clock in the forenoon of that day, or as soon thereafter as the same can be heard, on the report of the examiner made and filed in said cause.

JENNER & LEGG,
Solicitors for Plaintiffs, Seattle, Washington.

Due service of a copy of the foregoing notice admitted this 29th day of July, 1896.

F. S. GRIFFITH,
Solicitor for Defendant.

161 (Endorsed:) Notice. Filed July 31, 1896. In the U. S circuit court. A. Reeves Ayres, clerk, by A. N. Moore deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant.

Jenner & Legg, solicitors for plaintiffs.
F. S. Griffith, solicitor for defendant.

Opinion.

Filed August 6th, 1896.

HANFORD, *District Judge:*

The land which is the subject of controversy in this suit was entered under the act of June 3, 1878 (Supp. R. S. U. S., 167, 2nd ed.), providing for the sale of lands chiefly valuable for timber and stone, and the complainants purchased the same several years after the entry had been allowed at the local land office. By an order of the Commissioner of the General Land Office, the entry was sus-
162 pended, and after the taking of proofs and the usual hearings, the entry was, by an order of the Secretary of the Interior,

canceled, and a patent for the same land has been issued to the defendant.

The opinion of the Secretary of the Interior shows that the original entry was deemed fraudulent, and on that ground solely it was canceled, and that no consideration whatever was given to the rights of the complainants as *bona fide* purchasers. It is my opinion that where land has been regularly entered under the act above referred to, it is not subject to forfeiture after it has been conveyed to a *bona fide* purchaser. (Lewis *vs.* Shaw, 70 Fed. Rep, 289, 294.) It is also my opinion that the evidence clearly shows that the complainants are *bona fide* purchasers, within the meaning of that phrase, in the act of Congress above referred to.

I also hold that the case in the Land Department, after the entry had been suspended, should have been adjudicated by the board composed of the Attorney General, the Secretary of the Interior, and the Commissioner of the General Land Office, as provided by sections 2450 and 2451, R. S., and that the Secretary of the Interior, without a determination of the board, could not lawfully cancel the entry. (Stimson Land Co. *v.* Hollister, Fed. Rep.)

Decree for complainants, as prayed for.

C. H. HANFORD, *Judge.*

(Endorsed:) Opinion. Filed August 6, 1896. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

163 In the United States Circuit Court for the District of Washington, Northern Division, Holding Terms at the City of Seattle.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Decree.

This cause came on to be heard on this the 3d day of August, 1896, upon the report of the master in chancery, and upon argument of the respective solicitors for plaintiff and defendant, and the court having fully considered the same, and being fully advised in the premises, upon consideration thereof it was considered, adjudged, and decreed as follows, viz:

That the said defendant, L. Edgar Diller, is a resident of the province of British Columbia; that said defendant voluntarily submitted himself to the jurisdiction of this court by appearing in this cause; that the plaintiffs, Ravaud K. Hawley and Russell A. Alger, are the equitable owners in fee and entitled to the legal title of all the lands described in their bill of complaint, namely: the northwest quarter of the northeast quarter and the north half of
164 the northwest quarter of section thirteen, and the southeast quarter of the southwest quarter of section twelve, all in township thirty-six north of range three east, Willamette meridian; that the patent of the United States of America issued to said de-

fendant, L. Edgar Diller, for said above-described land; that said patent was improvidently issued, and was issued without authority of law, and that said patent is a cloud upon the title of said plaintiffs to the lands therein described, and that said cloud should be removed, and whatsoever title may have accrued to said defendant under or through said patent, is, by the said defendant, L. Edgar Diller, held in trust for the use and benefit of said plaintiffs, Ravaud K. Hawley and Russell A. Alger.

It is further considered, adjudged, and decreed that the said defendant, L. Edgar Diller, convey to said plaintiffs, Ravaud K. Hawley and Russell A. Alger, whatsoever of title he may have obtained or acquired under and by virtue of said patent, free and clear of any and all encumbrance whatsoever; that said defendant convey said title, as aforesaid, by good and sufficient deed, within ten days from the date of the filing hereof, and upon the neglect, failure, or refusal of said defendant so to do within said time prescribed, then, and in that event, Eben Smith, Esquire, master in chancery of this court, is hereby directed and authorized to make, execute, and deliver to said plaintiffs a conveyance of all the lands herein and in said patent described, which said conveyance shall be of the same force and effect, and convey the title thereto the same as
165 though signed, executed and delivered by said defendant; that the title of said plaintiffs to the land in said patent described be, and is, forever quieted as against said defendant claiming title thereto as aforesaid.

That plaintiffs have and recover from said defendant their costs and disbursements in this behalf expended, in the sum of — dollars, the same to be taxed, and that they have execution therefor.

Enter.

August 8th, 1896.

C. H. HANFORD, *Judge.*

Due service of the within decree admitted this 8th day of August, 1896, and found correct.

F. S. GRIFFITH,
Solicitor for Defendant.

(Endorsed:) Decree. Filed Aug. 8, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

166 United States Circuit Court for the District of Washington.

RAVAUD K. HAWLEY and RUSSELL A. ALGER
vs.
L. EDGAR DILLER. } No. 537.

Præcipe for Transcript.

To the clerk of the above-entitled court:

You will please prepare and certify to the U. S. circuit court of appeals transcript on appeal in above-entitled cause, including therein the following:

Bill of complaint, demurrer to bill, notice setting demurrer, order overruling demurrer, plea and answer, notice setting plea, order overruling plea, general replication, notice setting cause for argument, decree, assignment of errors, petition for appeal, order allowing appeal, bond on appeal and stipulation, citation, opinion, proofs and testimony.

Dated Aug. 24, 1896.

F. S. GRIFFITH,
Solicitor for Appellant.

(Endorsed:) Præcipe. Filed Aug. 24, 1896. A. Reeves Ayres, clerk; H. M. Walthew, deputy clerk.

167 In the United States Circuit Court for the District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Petition for Appeal.

The above-named defendant, L. Edgar Diller, conceiving himself aggrieved by the final decree and decision, made by the circuit court of the United States for the district of Washington, northern division, on the 8th day of August, 1896, which said decree was greatly to the prejudice and injury of the said defendant, and the same is erroneous and inequitable in many particulars, and he doth appeal from said final decree to the circuit court of appeals for the ninth circuit, and he prays this honorable court that this his appeal may be allowed, upon his giving sufficient security.

F. S. GRIFFITH,
Solicitor for Defendant.

Receipt of a copy hereby acknowledged this 20th day of August, A. D. 1896.

JENNER & LEGG,
Solicitors for Plaintiffs.

168 (Endorsed:) Petition for appeal. Filed this Aug. 26, 1896. A. Reeves Ayres, clerk, by H. M. Walthew, deputy clerk.

In the United States Circuit Court for the District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Assignment of Errors.

Now comes the defendant and appellant, by his solicitor, F. S. Griffith, and assigns the following errors occurring herein:

First. The court erred in assuming jurisdiction of the above-en-

titled action, as that the same was a question of fact which had been decided by the United States land officers, they having jurisdiction to decide the matters and things set forth in plaintiffs' bill of complaint.

169 Second. The court erred in overruling the demurrer interposed to the plaintiffs' complaint.

Third. The court erred in making a decree that the defendant hold the property in question in trust for the plaintiffs and to convey the same thereto; and that the plaintiffs are the equitable holders of the title to said property.

Dated August 19th, 1896.

F. S. GRIFFITH,
Solicitor for Appellant.

Receipt of a copy hereby acknowledged this 20th day of August, A. D. 1896.

JENNER & LEGG,
Solicitors for Plaintiffs.

(Endorsed:) Assignment of errors. Filed Aug. 26, 1896. A. Reeves Ayres, clerk, by H. M. Walthew, deputy clerk.

170 In the United States Circuit Court for the District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Order Allowing an Appeal.

Upon hearing and filing the foregoing petition, and, it appearing to the court to be a proper cause for the allowance of an appeal, it is ordered: That the prayer of the said petitioner be granted and said appeal be allowed, and that complainant and appellant enter into security on appeal as required by law in the sum of five hundred dollars.

Dated this 1st day of September, 1896.

WM. B. GILBERT, *Judge.*

(Endorsed:) Order allowing appeal. Filed Sept. 3, 1896. A. Reeves Ayres, clerk, by H. M. Walthew, deputy clerk.

171 In the United States Circuit Court for the District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Bond on Appeal.

Know all men by these presents: That we, L. Edgar Diller and J. C. B. Lockwood, and Watson Allen, as sureties, are held and

firmly bound unto Ravaud K. Hawley and Russell A. Alger in the penal sum of five hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of August, A. D. 1896.

The condition of the above obligation is such that, whereas the above-bounden L. Edgar Diller, as principal, has appealed from an order and decree of the circuit court of the United States, district of Washington, northern division, dated August 8th, 1896, decreeing the said L. Edgar Diller to hold the title to certain lands in
172 trust for the plaintiffs and to convey the same to them, to the United States circuit court of appeals for the ninth circuit; now therefore, if the said L. Edgar Diller, appellant as aforesaid, shall well and truly prosecute his said appeal to effect, and shall answer all damages and costs, if he shall fail to make his plea good, then this obligation to be void, otherwise to be and remain in full force and effect.

J. B. C. LOCKWOOD. [SEAL.]
WATSON ALLEN. [SEAL.]

Signed, sealed, and delivered in the presence of—

G. A. HILL.
F. S. G-IFFITH.

STATE OF WASHINGTON, } *ss*:
County of King, }

J. B. C. Lockwood and Watson Allen, being first duly sworn, upon his oath, each for himself, and not one for the other, deposes and says: That he is a resident of the county of King and State of Washington, over the age of twenty-one years, and a citizen of the United States; that he is not an attorney, counselor-at-law, sheriff, marshal, clerk of a court of record, or any officer of said court; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities, in property situated in said State of Washington, and not exempt by law from sale on execution.

J. B. C. LOCKWOOD.
WATSON ALLEN.

173 Subscribed and sworn to before me this 25th day of August, 1896.

[SEAL.] G. A. HILL,
Notary Public in and for the State of Washington, Residing at the City of Seattle, King County, State of Washington.

In the United States Circuit Court for the District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Stipulation as to Bond on Appeal.

It is hereby stipulated and agreed by and between the respective parties to the above-entitled action, by their respective solicitors below designated, that the bond on appeal filed in the above-entitled action shall be the bond of the defendant to complete and perfect his appeal to the circuit court of appeals for the ninth circuit, and that the plaintiffs accept the sureties to said bond as good
174 and sufficient sureties. Said bond is to be given in the sum of five hundred dollars, and is to be conditioned according to the law governing appeals.

Dated this 24th day of August, 1896.

JENNER & LEGG,
Solicitors for the Plaintiffs.
F. S. GRIFFITH,
Solicitor for the Defendant.

(Endorsed:) Bond on appeal and stipulation. Filed this Sept. 3, 1896. A. Reeves Ayers, clerk, by H. M. Walthew, deputy clerk.

In the United States Circuit Court for the District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant. } No. 537.

Citation (Copy).

UNITED STATES OF AMERICA, *ss:*

To Ravaud K. Hawley and Russell A. Alger, Greeting:

You and each of you are hereby cited and admonished to
175 be and appear at a term of the United States circuit court of appeals to be held in the city of San Francisco, for the ninth circuit, on the 5th day of October, 1896, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Washington, northern division, wherein Ravaud K. Hawley and Russell A. Alger are plaintiffs, and L. Edgar Diller is defendant and appellant, to show cause, if any there be, why the decree in said appeal should not be corrected and speedy justice — to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 5th day of September, 1896.

Dated September 5th, 1896.

[SEAL.] C. H. HANFORD, *Judge.*

Copy of the above citation this day received and service of the same is hereby admitted this 5th day of September, 1896.

JENNER & LEGG,
Solicitors for the Pl'ffs and Respondents.

(Endorsed:) Citation on appeal. Filed Sept. 5, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

176 In the Circuit Court of the United States for the District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs,
vs.
L. EDGAR DILLER, Defendant.
} No. 537.

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, *District of Washington,* } ss:

I, A. Reeves Ayres, clerk of the circuit court of the United States, for the district of Washington, do hereby certify the foregoing one hundred and fifty-five (155) typewritten pages, numbered from one (1) to one hundred and fifty-five (155), inclusive, to be a full, true, and correct transcript of the record on appeal to the United States circuit court of appeals for the ninth judicial circuit in above-entitled cause, wherein the above-named plaintiffs, Ravaud K. Hawley and Russell A. Alger, are appellees, and the above-named defendant, L. Edgar Diller, is appellant.

177 I further certify that the cost of preparing and certifying the said transcript on appeal amounts to the sum of eighty-four dollars and thirty cents ($84.30), and that the same has been paid to me by F. S. Griffith, solicitor for appellant, L. Edgar Diller.

Witness my hand and seal of said circuit court at Seattle this 5th day of September, 1896.

[SEAL.]

A. REEVES AYRES, *Clerk*,
By R. M. HOPKINS,
Deputy Clerk.

In the Circuit Court of the United States for the District of Washington, Northern Division.

RAVAUD K. HAWLEY and RUSSELL A. ALGER, Plaintiffs, *vs.* L. EDGAR DILLER, Defendant. } No. 537.

Citation (Original).

UNITED STATES OF AMERICA, *ss:*

To Ravaud K. Hawley and Russell A. Alger, Greeting:

178 You and each of you are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals to be held in the city of San Francisco, for the ninth circuit, on the 5th day of October, 1896, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Washington, northern division, wherein Ravaud K. Hawley and Russell A. Alger are plaintiffs and L. Edgar Diller is defendant and appellant, to show cause, if any there be, why the decree in said appeal should not be corrected and speedy justice — to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 5th day of September, 1896.

Dated September 5th, 1896.

[SEAL.] C. H. HANFORD, *Judge.*

Copy of the above citation this day received and service of the same is hereby admitted this 5th day of September, 1896.

JENNER & LEGG,
Solicitors for the Pl'ffs and Respondents.

(Endorsed:) Filed Sept. 5, 1896. In the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

179 (Endorsed:) No. 329. United States circuit court of appeals, ninth circuit. L. Edgar Diller, appellant, *vs.* Ravaud K. Hawley and Russell A. Alger. Transcript of record. Appeal from the circuit court of the United States, district of Washington, northern division. Filed September 8th, 1896. F. D. Monckton, clerk.

180 In the United States Circuit Court of Appeals for the Ninth Circuit.

L. EDGAR DILLER, Appellant, *v.* RAVAUD K. HAWLEY ET AL., Appellees. } No. 329.

Appeal from the circuit court of the United States for the district of Washington, northern division.

This suit was brought by Ravaud K. Hawley and Russell A. Alger, the appellees, against L. Edgar Diller, the appellant herein,

to compel the appellant to convey certain land to them which had been conveyed to him by a United States patent.

On the 30th day of April, 1883, the land involved in this suit, to wit, the northwest quarter of northeast quarter and north one-half of northwest quarter of section thirteen, and the southeast quarter of the southwest quarter of section twelve, all in township thirty-six north of range three east, Willamette meridian, in the county of Skagit, Territory (now State) of Washington, was unoccupied and unappropriated surveyed public land of the United States, and was subject to entry and purchase under the timber and stone act of Congress of June 3, 1878 (20 U. S. St., 89).

181 On said day one Henry C. Hackley made application to purchase the land from the United States under said act in the local land office at Olympia, Washington Territory, and paid to the receiver of the land office the sum of $400.00, that being the amount prescribed by law as the purchase price of the same, and then and there received a certificate of the receipt from said land office known as the final or duplicate receipt. On the same day said Hackley, for a valuable consideration, sold, assigned, and transferred said receipt and certificate and the land therein described to one Stephen S. Bailey, and duly made, executed, and delivered to said Bailey a good and sufficient warranty deed, conveying said property to said Bailey. On December 29, 1887, Stephen S. Bailey and his wife, for a valuable consideration, sold, assigned, and transferred all their right, title, and interest in and to said land to the appellees herein, and then and there made, executed, and delivered to said appellees a good and sufficient warranty deed therefor. On the 9th of August, 1888, the Commissioner of the General Land Office suspended the entry of said Henry C. Hackley and held the same for cancellation, and ordered the register and receiver of the United States land office at Seattle to notify said entryman and said transferees that they would be allowed 60 and 10 days from the date of said notice within which to apply for a hearing to show cause why said entry should not be cancelled. On August 23, 1888, the register and receiver notified Hackley and his transferees of the action of the Commissioner. The transferees thereafter applied for a hearing, which was granted and the hearing had. The register and receiver, after such hearing, were divided in opinion. The testimony taken at said hearing, with the records in the case,

182 were transmitted to the Commissioner of the General Land Office. The Commissioner decided that said lands should be passed to patent. The Secretary of the Interior thereupon ordered the papers in said case to be transferred to his office, and after a consideration of the same he ordered that said entry be cancelled, and directed the Commissioner of the General Land Office to cancel said entry on the records of the Land Department. On November 21, 1893, the Commissioner ordered the timber entry of Hackley canceled because said entry was made in the interest of another person, and not for the exclusive benefit of the entryman. On May 10, 1895, said land being then on the records of the Land

Office of the United States as a part of the public domain, L. Edgar Diller, appellant herein, made application to the register and receiver to make, and did make, entry of said land and purchased the same on July 25, 1895, and received from the Government a patent therefor under the said timber and stone act of June 3rd, 1878. Thereafter appellees brought this suit in the circuit court of the United States, praying that said L. Edgar Diller be decreed to convey to said appellees herein the title to said land. Upon a hearing the court entered a decree in favor of complainants (Hawley *v.* Diller, 75 Fed., 946), from which decree this appeal is taken.

F. Starr Griffith, for appellant.

Chas. K. Jenner, for appellees.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

HAWLEY, *District Judge:*

1. Did the Land Department have jurisdiction to cancel the entry of Henry C. Hackley?

183 This question must be answered in the affirmative. In American Mortgage Co. *v.* Hopper, 64 Fed., 553, this court had occasion to examine many of the authorities cited by the respective counsel herein. The same questions here urged were there elaborately discussed. In the course of that opinion the court said: "We are of opinion that the general trend and logical effect of the decisions of the Supreme Court of the United States virtually establish the following propositions concerning the disposition of the public lands of the United States, viz: (1) That the Land Department of the Government has the power and authority to cancel and annul an entry of public lands when its officers are convinced, upon a proper showing, that the same was fraudulently made; (2) that an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and paid for the same and in all respects complied with the requirements of the law; (3) that the Land Department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee; and (4) that redress can always be had in the courts where the officers of the Land Department have withheld from a pre-emptioner his rights, where they have misconstrued the law, or where any fraud or deception has been practiced which affected their judgment and decision."

Bell *v.* Hearne, 19 How., 252.
Gaines *v.* Thompson, 7 Wall., 347.
Litchfield *v.* Register and Receiver, 9 Wall., 575.
Secretary *v.* McGarrahan, *id.*, 298.

184 Johnson *v.* Towsley, 13 Wall., 72.
Myers *v.* Croft, *id.*, 291.
Yosemite Val. Case, 15 Wall., 77.
Shepley *v.* Cowan, 91 U. S., 330.
Moore *v.* Robbins, 96 U. S., 538.
Marqueze *v.* Frisbie, 101 U. S., 473.
Quinby *v.* Conlan, 104 U. S., 420.

Smelting Co. *v.* Kemp, *id.*, 636.
Lee *v.* Johnson, 116 U. S., 48.
Steel *v.* Refining Co., 106 U. S., 447.
Cornelius *v.* Kessel, 128 U. S., 456.
United States *v.* Steenerson, 50 Fed., 504.
Germania Iron Co. *v.* U. S., 58 Fed., 334.
Mill Co. *v.* Brown, 59 Fed., 35.
Swigart *v.* Walker, 30 Pac., 162.

The principles thus announced are fully sustained by the decision of the Supreme Court in the case of Orchard *v.* Alexander, 157 U. S., 372, where the court held that the Commissioner of the General Land Office may direct the proper local land officer to hear and pass upon charges of fraud and the final proof of the pre-emption claim upon which the requisite cash entry has been paid, and has jurisdiction to review the judgment of the local land officer in respect thereof, and the Secretary of the Interior has jurisdiction to review such judgment of the Commissioner and to order such an entry, shown to be fraudulent, to be cancelled.

The court, after referring to the statutes and to numerous authorities and quoting from Harkness *v.* Underhill, 1 Black,
185 316, 325; Hosmer *v.* Wallace, 97 U. S., 575, 578, and Knight *v.* Land Association, 142 U. S., 161, 167, said: "We have made these somewhat extensive quotations from prior decisions in order to show the rulings of this court since the act of 1836 in favor of the power of the general officers of the Land Department to review and correct the action of the subordinate officials in all matters relating to the sale and disposal of public lands. * * * Of course, this power of reviewing and setting aside the action of the local land officers is, as was decided in Cornelius *v.* Kessel, 128 U. S., 456, not arbitrary and unlimited. It does not prevent judicial inquiry. Johnson *v.* Towsley, 13 Wall., 72. The party who makes proofs which are accepted by the local land officers and pays his money for the land has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to State taxation. Carroll *v.* Safford, 3 How., 441; Witherspoon *v.* Duncan, 4 Wall., 210. The Government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts or forbid an inquiry and determination in the Land Department." The entire opinion is instructive. Its reasoning is sound, clear, and conclusive upon the question here involved. This opinion is referred to and followed with approval in Parsons *v.* Venzke, 164 U. S., 89.

186 2. It is argued upon behalf of the appellees that the decision of the Secretary of the Interior ordering the cancellation of the entry is null and void. This contention is sought to be maintained upon the ground that sections 2450 and 2451 of the Revised Statutes require the adjudication to be made by a board consisting of the Secretary of the Treasury, Attorney General, and

Secretary of the Interior, and that the Secretary of the Interior, without a determination by the board, could not lawfully cancel the entry. These sections must be read and construed with reference to the other provisions of the act, and especially with reference to the provisions of section 2457, which reads as follows: "The preceding provisions from section 2450 to section 2456, inclusive, shall be applicable to all cases of suspended entries and locations, which have arisen in the General Land Office since the 26th day of June, 1856, as well as to all cases of a similar kind which may hereafter occur, embracing as well locations under bounty land warrants as ordinary entries or sales, including homestead entries and pre-emption locations or cases; where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained; and where the rights of no other claimant or pre-emptor are prejudiced, or where there is no adverse claim."

With the limitations thus placed upon the construction to be given to sections 2450 and 2451, we are of opinion that the views contended for by appellees cannot be sustained. No authorities are cited to support their contention, and we apprehend none can be found except the opinion rendered by the circuit court in this
187 case, 75 Fed., 946, and by the same court in Stimson Land Co. *v.* Hollister, 75 Fed., 941, 945.

The only decision of the Supreme Court with reference to the provisions of these sections to which our attention has been called is Foley *v.* Harrison, 15 How., 443, 447. In that case the court held that under the act of August 3, 1846 (which includes sections 2450 and 2451), the Commissioner of the General Land Office had power to decide, finally, on the claims of the respective parties to certain lands, and that his decision and a patent issued thereon were conclusive. In the course of the opinion the court said: "These patents were issued under the act of 3rd of August, 1846. That act provides 'that the Commissioner of the General Land Office be, and he is hereby authorized and empowered, to determine, upon principles of equity and justice, as recognized in courts of equity, and in accordance with general equitable rules and regulations to be settled by the Secretary of the Treasury, the Attorney General and Commissioner conjointly, consistently with such principles, all cases of suspended entries now existing in said land offices and to adjudge in what cases patents shall issue upon the same' (secs. 2450, 2451, Rev. St.). This power is limited to two years, and the exercise of it shall only operate to divest the title of the United States, but shall not prejudice conflicting claimants."

In the numerous decisions of the Supreme Court sustaining the authority of the Commissioner of the General Land Office and of the Secretary of the Interior to affirm, modify, or annul the entries of public land made in the local land offices no reference is
188 made to the provisions of sections 2450, 2451. Notwithstanding this fact, we are asked to assume that that court must have overlooked these provisions of the statute. We decline to act upon any such presumption.

3. The next question for consideration is whether or not the appellees were innocent purchasers for value and are entitled as such to be protected, notwithstanding the fraud, if any, committed by the entryman. The certificate or receipt which Hackley received from the land office invested him with the equitable title to the land in controversy. By this purchase he obtained the right to a patent to the land, provided his acts were in all respects such as, under the law, justified the issuance to him of a patent thereto. His purchase of the land was necessarily subject to the rules and regulations of the Land Department. It was subject to the control of the Commissioner of the General Land Office. The decisions of the local land office and of the Commissioner were liable to be reversed by the action of the Secretary of the Interior.

The law is well settled that the purchase of an equitable title takes only such an interest in the property as his grantors had at the time of the purchase. This being true, it logically follows that when Bailey took the deed from Hackley, and when the appellees took the deed from Bailey, they only acquired a title to the land, which was subject to the final action of the Land Department and to such steps or proceedings as might thereafter be had in the courts to affirm, modify, or annul the final decision of the officers of the Land Department in regard thereto. Having purchased the land
before the issuance of the patent, while the Government still
189 held the legal title, they obtained only an equitable title, and
are not entitled to protection as *bona fide* purchasers. This result necessarily follows from the views expressed and authorities cited in the first subdivision of this opinion. See also California Redwood Co. *v.* Litle, 79 Fed., 854, 856.

4. Finally, it is argued on behalf of appellees that the decision of the Secretary of the Interior cancelling the entry of Hackley "was solely the result of his misconstruction, misinterpretation, and misunderstanding of the law, and that it was not the result of his judgment upon the facts presented for his consideration." There were eleven other entrymen whose cases were considered at the same time as Hackley's, and the decision of the Secretary of the Interior applies to all the cases. In his decision the Secretary said: "The paramount and controlling question in the case, applicable alike to all these entries, is: Were they made in good faith for the benefit of the respective entrymen, or were they fraudulently made for and in the interest of another or others? The fraud charged in connection with these entries is that they were made at the instance and for the benefit of Stephen S. Bailey and J. Theodore Lohr, to whom the lands were sold and conveyed, one tract before and the others soon after the entries were made. The Government offered no testimony-in-chief to support the allegations that said entries were made in the interest of said transferees other than what might reasonably be inferred from the records showing dates of
said entries and transfers thereof. These entries were all
190 transferred to said Stephen S. Bailey."

Lohr conducted the negotiations concerning all the lands. He "conducted the negotiations for the purchase of Hackley's

entry, but made no agreement prior to April 30, 1883, the date of his entry." This witness was asked the following question: "Did it occur to you when you were locating these entrymen and subsequently buying up their claims for the mutual benefit of S. S. Bailey and yourself that you were operating in direct violation of the spirit of the timber law?" and he answered, "I did not believe that I was violating any law any more than I would buy locations made by other parties, so long as I used due diligence in making purchases when parties had the right to sell, according to the advice given me." This witness also stated that he had been paid by Mr. Bailey his full share of the profits arising from the sale to Hawley and Alger, and had no interest in the result of the trial.

In addition to the testimony given at the hearing the Secretary referred to the fact that one Carson, a special agent of the Government, had investigated the cases and reported all the entries as fraudulent. None of the entrymen were called as witnesses for the transferees, nor was Bailey sworn or offered as a witness on his own behalf. The Secretary, in reviewing the testimony, said: "I have thus stated in detail and at unusual length the evidence relating to the alleged fraudulent character of these entries in the transactions between Bailey and the entrymen for the purpose of making clear the grounds upon which my conclusion is based. At every point Mr. Bailey appears. The conveyances were made to him very shortly after the entries
191 were made. He advanced the money to make the entries in most, if not in all, cases. He was a hotel-keeper; Lohr was to select the lands, find the persons to make the entries, locate them thereon, and Bailey was to pay the expenses; upon the purchase of the land Bailey was to receive a deed for the tract and Lohr and Bailey were to divide the profits between them. Lohr says this is so in his affidavit, altho' it is true he seeks to avoid it when he is put on the witness stand. All the circumstances satisfy my mind that this was the arrangement. Lohr picked up clerks, bartenders, grocery men, school teachers, lawyers—in a word, anybody who was willing to make the location or be concerned in it for a consideration. They were mostly young men without any permanent abiding place. It is very strange indeed if they entered that land for their exclusive use and benefit that they should have conveyed it to Mr. Bailey on the same day that the entries were made or within a day or two thereafter when the evidence shows that he was engineering these entries from the time the parties made the first affidavit until they submitted their final proof in support of their entries. It is very plain to my mind that this was a scheme put up in the first instance by Lohr and Bailey for the purpose of acquiring title to the land for speculative purposes. To my mind this raises an impassable barrier, if the law is to be observed, to the sustaining of these entries. The purpose and intent of the act was to give every citizen of the United States, or one who has declared his intention of becoming such, the opportunity to purchase 160 acres of land under said act if it was unfit for
192 cultivation, but in every case the entryman is required to act in good faith, but none of the entrymen at the time they

made these purchases did so in good faith in harmony with the spirit and letter of the law. This holding in nowise conflicts or interferes with the right of a purchaser in good faith of land under the act after he acquires title to sell the land if he desires so to do. Sales made soon after purchase, however, if unexplained, have a tendancy to arouse suspicion in the mind that when the entry was made it was not for the entryman's own exclusive benefit and use, and when we find 12 entries made in the manner in which these were made—money furnished by the assignee, engineered by the assignee, deeded to the assignee—and this arrangement made prior to the time the locations were made, I do not see any escape from the conclusion that they were made in violation of the statute and ought not to stand."

In the administration and disposition of the public lands the decisions of the Land Department upon the questions of fact are deemed conclusive. It is only questions of law that are reviewable in the courts.

Bishop of Nesqually *v.* Gibbon, 158 U. S., 165, 166, and numerous authorities there cited.

The Secretary of the Interior found as a fact that the entry was made by Hackley "for the purpose of acquiring the land for speculative purposes;" that the entry was not made "in good faith in harmony with the spirit and letter of the law."

Did the Secretary of the Interior err in his construction or interpretation of the law? We are of opinion that this question must be answered in the negative.

Section 2 of the act of Congress of June 3, 1878, provides
193 that any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement, among other things, "that he does not apply to purchase the same on speculation but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself, which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated, and if any person taking such oath shall swear falsely in the premises he shall be subject to all the pains and penalties of perjury and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made except in the hands of *bona fide* purchasers shall be null and void."

United States *v.* Budd, 144 U. S., 154, is relied upon to support the views that the Secretary of the Interior acted upon an erroneous construction of this act. That case was, in many essential particulars, different from the case at bar. There the entry was made by Budd, who paid the purchase price and received the receiver's receipt, and thereafter a patent was issued to him by the Govern-

ment. Prior to the issuance of the patent he sold and conveyed the land to one Montgomery. The suit was brought by the United States against Budd and Montgomery to set aside the patent on the
194 ground that it was obtained wrongfully and fraudulently and in defiance of the restrictions of the statute. The case was disposed of upon the familiar principle that in this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon the official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof.

Maxwell Land Grant Cases, 121 U. S., 325, 381.
Colorado Coal Co. *v.* U. S., 123 U. S., 397.
United States *v.* Des Moines Navigation Co., 142 U. S., 510.

The particular charge there made and relied upon by the Government was "that Budd, before his application, had unlawfully and fraudulently made an agreement with his codefendant Montgomery, by which the title he was to acquire from the United States should inure to the benefit of such codefendant." The evidence in that case failed to establish this charge by the proofs demanded under the rule as above stated. The Land Department and the circuit court so held, and the Supreme Court affirmed the judgment. The court, in the course of its opinion, said that all that the act "denounces is a prior agreement, the acting for another in the purchase. If, when the title passes from the Government, no one save the purchaser has any claim upon it or any contract or agreement for it, the act is satisfied."

This language should be construed with reference to the
195 particular charge made by the pleadings in that case. We are of opinion that it was not intended by the court to apply to all of the provisions of the act contained in section 2. In that case the testimony about other entries was excluded. Here, by stipulation, 12 entries were tried as one and the entire testimony in all the cases was admitted. In the present case, in many respects, the questions involved are entirely the reverse of those presented to the court in United States *v.* Budd. Here, if any presumptions are to be indulged in, they must be invoked in behalf of the action of the Land Department. It must be clearly and convincingly shown that the Secretary of the Interior acted without authority of law or that he erred in his judgment as to the legal construction of the act.

We are of opinion that the evidence upon which the Secretary of the Interior acted was sufficient to justify the inference that there was some prior understanding, although not directly shown, between Hackley, the entryman, and Lohr, acting with and for Bailey, that his acts should inure to their benefit, and that he applied to purchase the land on a speculation and not "in good faith to appropriate it to his own exclusive use and benefit," and that such

acts are as much in violation of the statute as if the entryman had directly made a contract in writing with a person by which the title which he might acquire from the Government should inure to such person, and that the facts elicited upon the trial of this case in the circuit court are not of such a character as to authorize the court to enter a decree in favor of the appellees herein.

196 The decree and judgment of the circuit court is reversed with directions to the court to dismiss the bill with costs in favor of appellant.

(Endorsed:) Opinion. Filed June 28, 1897. F. D. Monckton, clerk.

197 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1896.

L. EDGAR DILLER, Appellant,
v.
RAVAUD K. HAWLEY and RUSSELL A. ALGER, Appellees. } No. 329.

Appeal from the circuit court of the United States for the district of Washington, northern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, northern division, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed, with directions to the lower court to dismiss the bill with costs in favor of appellant.

(Endorsed:) Decree. Filed June 28, 1897. F. D. Monckton, clerk.

198 In the United States Circuit Court of Appeals for the Ninth Circuit.

L. EDGAR DILLER, Complainant,
v.
REVAUD K. HAWLEY and RUSSELL A. ALGER, Respondent-. } No. 329.

The above-named respondents, Revaud K. Hawley and Russell A. Alger, conceiving themselves aggrieved by the judgment and order entered June 28th, 1897, in the above-entitled cause, do hereby appeal from said judgment and order to the Supreme Court of the United States, and they pray that their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said judgment and order was made, duly authenticated, may be sent to the Supreme Court of the United States.

CHAS. K. JENNER,
Solicitor for Appellants, Revaud K. Hawley and Russell A. Alger, No. 407–'8 Seattle National Bank Building, Seattle, Wash.

And now, to wit, on May 23, 1898, it is ordered that the appeal be allowed as prayed for.

WM. B. GILBERT, *Judge.*

Due service of the above notice of appeal and order allowing appeal admitted and copy thereof received this 28th day of May, A. D. 1898.

FRANK STARR GRIFFITH,
Solicitor for Respondent, L. Edgar Diller.

(Endorsed:) Notice and allowance of appeal. Filed June 1, 1898. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

199 In the Supreme Court of the United States.

REVAUD K. HAWLEY and RUSSELL A. ALGER, Appellants, *v.* L. EDGAR DILLER, Respondent. } No. —.

Assignment of Errors.

Now come the above-named appellants, Revaud K. Hawley and Russell A. Alger, by their solicitor, C. K. Jenner, Esq., and say that in the record and proceedings in the above-entitled cause in the United States circuit court of appeals for the ninth circuit there was manifest error, and they hereby assign as errors of the court herein the following, to wit:

I.

That the court below erred in deciding that the Land Department had jurisdiction to cancel the entry of Henry C. Hackley.

II.

That the court below erred in deciding that the Commissioner of the General Land Office or any other officer of the Land Department of the United States had jurisdiction to pass upon charges of fraud or to consider them at all against the land entry of Henry C. Hackley.

III.

The court below erred in deciding that under sections 2450 and 2451 of the Revised Statutes of the United States the consideration and adjudication upon the entry of Henry C. Hackley could be considered at all by other than a board consisting of the Secretary of the Interior and the Attorney General.

200 IV.

The court below erred in deciding that Revaud K. Hawley and Russell A. Alger, respondents below, were not innocent purchasers for value received.

V.

The court below erred in not deciding that under the act of Congress of March 3d, 1878, known as the timber and stone act, upon proof being made to the satisfaction of the local land office, it is mandatory upon the Commissioner of the Land Office to issue patent therefor.

VI.

The court below erred in not finding and so deciding that said timber act of March 3d, 1878, recognized purchasers for value as innocent and *bona fide* purchasers, though the purchase is made before the issue of patent.

VII.

That the court below erred in deciding that the question decided by the Secretary of the Interior in regard to said entry was a question of fact, and therefore binding upon the courts, in that said decision of the Secretary of the Interior shows that said entry was cancelled by the Land Department on the ground of fraud, and fraud is not a question of fact.

VIII.

That the court below erred in finding and deciding that the Secretary of the Interior was justified in inferring fraud.

IX.

That the court below erred in rendering judgment that the decree and judgment of the court below be reversed, and directing the dismissal of the appeal, and ordering costs in favor of the appellants below.

CHAS. K. JENNER,
Solicitor for the Appellants, Revaud K. Hawley and Russell A. Alger.

201 Due service of the above assignment of errors admitted and copy received this 28th day of May, A. D. 1898.

FRANK STARR GRIFFITH,
Solicitor for Respondent, L. Edgar Diller.

(Endorsed:) Assignment of errors. Filed June 1, 1898. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

202 In the United States Circuit Court of Appeals for the Ninth Circuit.

REVAUD K. HAWLEY and RUSSELL A. ALGER, Appellants,
vs.
L. EDGAR DILLER, Respondent. } No. —.

Bond.

Know all men by these presents that we, Revaud K. Hawley, of Cleveland, Ohio, and Russell A. Alger, of Detroit, Mich., as princi-

pals, and Watson Allen and J. B. C. Lockwood, both of Seattle, Washington, as sureties, are held and firmly bound unto the said L. Edgar Diller in the sum of five hundred ($500.00) dollars, to be paid to the said L. Edgar Diller; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 8th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas the above-named Revaud K. Hawley and Russell A. Alger have procured an appeal to reverse the judgment rendered by the justices of the circuit court of appeals for the ninth circuit in favor of the above-named L. Edgar Diller and against the said Revaud K. Hawley and Russell A. Alger:

Now, therefore, the condition of this obligation is such that if the above-named appellants, Revaud K. Hawley and Russell A. Alger, shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

203

REVAUD K. HAWLEY,
By his att'y, C. K. JENNER.
RUSSELL A. ALGER,
By his att'y, C. K. JENNER.
WATSON ALLEN.
J. B. C. LOCKWOOD.

STATE OF WASHINGTON, } ss:
County of King, }

Now, on this 8th day of June, A. D. 1898, personally appeared before me, Hiram J. Jacobs, a notary public in and for the State of Washington, Watson Allen and J. B. C. Lockwood, known to me to be the same persons who executed the within instrument, and they each acknowledged to me that they executed the same freely and voluntarily for the purposes and uses therein mentioned.

[SEAL.] HIRAM J. JACOBS,
Notary Public in and for the State of Washington,
Residing at Seattle.

STATE OF WASHINGTON, } ss:
County of King, }

Watson Allen and J. B. C. Lockwood, being first duly sworn, each for himself, and not one for the other, deposes and says that he is a householder in the State of Washington; that he is worth the sum of one thousand dollars over and above all his just debts and liabilities and property exempt from execution and forced sale, and that he is not an attorney-at-law, sheriff, or county clerk.

WATSON ALLEN.
J. B. C. LOCKWOOD.

Subscribed and sworn to before me this 8th day of June, A. D. 1898.

[SEAL.] HIRAM J. JACOBS,
Notary Public in and for the State of Washington,
Residing at Seattle.

This bond approved by—
WILLIAM B. GILBERT,
Judge of U. S. Circuit Court of Appeals, Ninth Circuit.

Due service of the above bond admitted and copy thereof received this 9th day of June, A. D. 1898.

FRANK STARR GRIFFITH,
Solicitor for Respondent, L. Edgar Diller.

(Endorsed:) Bond on appeal. Filed Jun- 27, 1898. Frank D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit, by Meredith Sawyer, deputy clerk.

204 United States Circuit Court of Appeals for the Ninth Circuit.

L. EDGAR DILLER, Appellant,
v.
RAVAUD K. HAWLEY and RUSSELL A. ALGER, Appellees. } No. 329.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing two hundred and three pages, numbered from one to two hundred and three, both inclusive, to be a true copy of the record and of the assignment of errors and of all proceedings in the above-entitled cause, including the opinion filed, as the originals thereof remain of record in said circuit court of appeals, and that the same constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 27th day of June, A. D. 1898.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

FRANK D. MONCKTON,
Clerk United States Circuit Court of Appeals
for the Ninth Circuit,
By MEREDITH SAWYER,
Deputy Clerk.

205 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

To L. Edgar Diller, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington,

D. C., on or before sixty days from this date, personally and answer to the appeal filed in the clerk's office of the United States court of appeals for the ninth circuit, wherein Ravaud K. Hawley and Russell A. Alger are appellants and L. Edgar Diller is respondent, to show cause, if any there be, why the judgment in the said appeal and writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. William B. Gilbert, judge of the United States circuit court of appeals, ninth circuit, this seventh day of June, A. D. 1898.

WILLIAM B. GILBERT,
Judge of U. S. Circuit Court of Appeals, 9th Circuit.

Due service of the above citation admitted and copy thereof received this 9th day of June, A. D. 1898.

FRANK STARR GRIFFITH,
Solicitor for Respondent, L. Edgar Diller.

206 [Endorsed:] Dock. No. 329. In the United States supreme Court for the district of Washington, — division. Ravaud K. Hawley and Russell A. Alger, appellants, *vs.* L. Edgar Diller, respondent. Citation. Filed Jun- 27, 1898. Frank D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit, by Meredith Sawyer, deputy clerk. ——— ———, attorney for —.

207 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss*:

To L. Edgar Diller, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on or before sixty days from this date, personally and answer to the appeal filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein Ravaud K. Hawley and Russell A. Alger are appellants and L. Edgar Diller is respondent, to show cause, if any there be, why the judgment in the said appeal and writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 14 day of June, A. D. 1898.

WM. B. GILBERT,
Judge of U. S. Circuit Court of Appeals, Ninth Circuit.

Due service of the above citation admitted and copy thereof received this 16th day of June, A. D. 1898.

FRANK STARR GRIFFITH,
Solicitor for Respondent, L. Edgar Diller.

208 [Endorsed:] Dock. No. 329. In the United States Supreme Court. Ravaud K. Hawley and Russell A. Alger, appellants, *vs.* L. Edgar Diller, respondent. Citation. Filed Jun. 27, 1898. Frank D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit, by Meredith Sawyer, deputy clerk. ——— ———, attorney for —.

Endorsed on cover: Case No. 16,958. U. S. C. C. of appeals, 9th circuit. Term No., 116. Ravaud K. Hawley and Russell A. Alger, appellants, *vs.* L. Edgar Diller. Filed August 22d, 1898.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

CHAUNCEY S. TRUAX AND L. DEAN HOLDEN, Trustees of the Estate of Ravaud K. Hawley, Deceased, and RUSSELL A. ALGER,
Appellants,

vs.

L. EDGAR DILLER,
Appellee.

No. 116.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

Prior to the 30th day of April, 1883, the N. W. ¼ of N. E. ¼ and N. ½ of N. W. ¼ of section 13, and the S. E. ¼ of the S. W. ¼ of section 12, all in township 36 north, of range 3 east, Willamette meridian, in the county of Skagit, Territory (now State) of Washington, was surveyed public

land of the United States of America, and was subject to entry and purchase under the act of Congress of June 3d, 1878; that said land was then and there of the class and character subject to entry and purchase under the act of Congress of June 3d, 1878; that on said 30th day of April, 1883, one Henry C. Hackley, he having theretofore complied with all the requirements contained in the laws of the United States regarding the entry of public lands, and acquiring title to the same under said act, did, on said day, at the United States Land Office, in Olympia, Washington Territory, purchase said lands from the United States, and he did, then and there, pay to the receiver of said Land Office in lawful money of the United States, the sum prescribed by law as the purchase price of the same, and that he, the said Henry C. Hackley, did then and there receive a certificate or receipt from said Land Office, known as the final or duplicate receipt.

That thereafter said Henry C. Hackley, for a valuable consideration, sold, assigned and transferred said receipt or certificate, and the land therein described, to one Stephen S. Bailey, and did then and there make, execute and deliver to said Stephen S. Bailey a good and sufficient deed of warranty, granting and conveying said property to said grantee.

That thereafter, and on December 29th, 1887, said Stephen S. Bailey and his wife, for a valuable consideration, sold, assigned, and transferred all their right, title and interest in and to all of said above described property to Ravaud K. Hawley and Russell A. Alger, appellants, and did, then and there make, execute and deliver to said appellants a good and

sufficient deed granting and conveying all the interests of the said grantors in and to the above described property to said appellants, and that appellants, ever since said last mentioned date, have been the sole owners in fee in and to all of said above described property, and entitled to the legal title in fee thereto.

That thereafter, and on the 9th day of August, 1888, the Commissioner of the General Land Office suspended said entry of said Henry C. Hackley, and held the same for cancellation, and ordered the register and receiver of said United States Land Office at Seattle to notify said entryman and said transferees, said Stephen S. Bailey and appellants, of said action, and to notify them that they would be allowed sixty days from the date of said notice, with ten days additional, within which to apply for a hearing to show cause why said entry should be sustained.

There were eleven other entries suspended by the Commissioner of the General Land Office at or about the same time, which had theretofore been conveyed by the several entrymen thereof to the said Stephen S. Bailey, and by him and wife conveyed to appellants by said deed executed on or about December 29th, 1887; the register and receiver of said Land Office served notice of the action of said Commissioner upon each of said transferees, whereupon said transferees applied to the Commissioner of the General Land Office for a hearing, as required to do by the rules of practice obtaining in said Land Office; a hearing was ordered, and, upon the application of said transferees the said eleven suspended entries, and said suspended entry

of Henry C. Hackley were consolidated, and the same were heard, tried and determined as one cause.

That a hearing was had before the register and receiver of said Land Office commencing on or about the 27th day of August, 1889, and continued from day to day taking testimony therein until about the 26th day of November, 1889; the reasons assigned in the notice to said transferees for suspending said entries were, first, that the lands embraced therein were not chiefly valuable for their timber, and were valuable for agricultural lands; and second, that the entries were fraudulent for the reason that they were entered at the request and in the interest of said Stephen S. Bailey, transferee. The testimony submitted during said period of three months was exclusively directed to the question as to the character of the land, whether the same was timber or agricultural lands, and not one witness was placed upon the stand by the Government who testified or was asked to testify in relation to the said allegation of fraud.

The register and receiver of said Land Office were divided in their opinions in said cause, the register recommending the cancellation of some of said entries and the removal of suspension as to others thereof, and the receiver recommending the removal of suspension as to all of said entries and that the same be passed to patent. Said register and receiver considered said consolidated cause only upon the question as to the character of the land, both agreeing and deciding that there was no evidence submitted to substantiate the allegation that said entries, or any one of them, had been made by the entryman thereof in the interest or for the benefit of said Stephen S. Bailey or any other party.

That thereafter, said cause and all the papers and testimony therein were transmitted to the Commissioner of the General Land Office, neither party appealing, such being the practice obtaining in the land department upon a divided opinion by the register and receiver of a local land office. Application was made to the Commissioner of the General Land Office that said cause be set for argument before him at his office in Washington, D. C., which said motion was granted and notice served thereof upon the parties in interest. After consideration of the testimony submitted in said cause, the Commissioner of the General Land Office decided that the lands embraced in said twelve entries, including said entry of said Henry C. Hackley were chiefly valuable for their timber and unfit for agricultural purposes and properly enterable under said act of June 3rd, 1878; that each of said twelve entries, including said entry of Henry C. Hackley were properly made, upon proper proof, and were in all respects regular and conformed to the requirements of said act; that there was no proof submitted whatever to sustain the allegation of fraud, and ordered that said suspension be removed, and that said twelve entries be passed to patent.

The Government of the United States took no appeal from said decision of the Commissioner of the General Land Office, but the Secretary of the Interior, immediately after the rendering of said decision, ordered the Commissioner of the General Land Office to transmit the testimony and all papers in said cause to his office and to suspend further action thereon; said papers were transmitted, in accordance with said order, and remained with the Secretary of the Interior

for the period of nearly three years, when, under date of October 19, 1893, the Secretary of the Interior ordered the cancellation of said twelve entries, including said entry of Henry C. Hackley, upon the ground, and none other, that each and all of said entries were fraudulent in that they were made for speculation and in the interests of Stephen S. Bailey.

In accordance with said order, said twelve entries, including the said entry of Henry C. Hackley, were cancelled, and the said above described lands were thereafter held and pretended to be a part of the public domain of the United States, and subject to entry under the public land laws of the United States.

That said decision and determination was made by the Honorable Secretary of the Interior, only, and not as a member of a board composed of the said Secretary of the Interior and the Attorney General, as required by law in actions upon suspended entries.

That thereafter, and on the —— day of ——, A. D. 1895, said L. Edgar Diller, said appellee, offered and was permitted by the register and receiver of the United States Land Office at Seattle to make, and he did make, entry of said above described tract of land under said Act of June 3rd, 1878, and was permitted to make payment for the same as purchaser under said Act, and thereafter, and on October 15th, 1895, a patent was issued to him therefor by the United States.

Thereupon transferees brought their bill of complaint in the United States Circuit Court of the Northern Division of Washington, praying that said L. Edgar Diller be decreed

to convey to appellants the title to all of said above described lands, and for such other and further relief as to the Honorable Court shall seem meet and equitable in the premises.

Said cause was heard in said Court, and after full consideration of the evidence submitted, and of the arguments of the solicitors for the respective parties, said Court granted the prayer of said bill and entered a decree accordingly, whereupon said appellee appealed therefrom to the United States Circuit Court of Appeals for the Ninth Circuit, which said Court, after arguments of the solicitors for the respective parties, and consideration thereof, reversed the decision of the lower Court, whereupon said appellants appealed therefrom to this Court.

ASSIGNMENT OF ERRORS.

I.

The Court below erred in deciding that the Land Department had jurisdiction to cancel the entry of Henry C. Hackley.

II.

The Court below erred in deciding that the Commissioner of the General Land Office or any other officer of the Land Department of the United States had jurisdiction to pass upon charges of fraud or to consider them at all against the land entry of Henry C. Hackley.

III.

The Court below erred in deciding that under sections 2450 and 2451 of the Revised Statutes of the United States the consideration and adjudication upon the entry of Henry

C. Hackley could be considered at all by other than a board consisting of the Secretary of the Interior and the Attorney General.

IV.

The Court below erred in deciding that Ravaud K. Hawley and Russell A. Alger, respondents below, were not innocent purchasers for value received.

V.

The Court below erred in not deciding that under the act of Congress of June 3d, 1878, known as the timber and stone act, upon proof being made to the satisfaction of the local land office, it is mandatory upon the Commissioner of the Land Office to issue patent therefor.

VI.

The Court below erred in not finding and so deciding that said timber act of June 3d, 1878, recognized purchasers for value as innocent and *bona fide* purchasers, though the purchase is made before the issue of patent.

VII.

The Court below erred in deciding that the question decided by the Secretary of the Interior, in regard to said entry, was a question of fact, and therefore binding upon the courts, in that said decision of the Secretary of the Interior shows that said entry was cancelled by the Land Department on the ground of fraud, and fraud is not a question of fact.

VIII.

The Court below erred in finding and deciding that the Secretary of the Interior was justified in inferrring fraud.

IX.

The Court below erred in rendering judgment that the decree and judgment of the Court below be reversed, and directing the dismissal of the appeal, and ordering costs in favor of the appellants below.

POINTS AND AUTHORITIES.

I.

"The Court below erred in deciding that the Land Department had jurisdiction to cancel the entry of Henry C. Hackley."

Said lands described in said certificate issued to Henry C. Hackley by the receiver of the Land Office, ceased to be public lands of the United States and to occupy status of a part of the public domain, the moment that said certificate was signed by the receiver of the Land Office and delivered to said entryman.

Carroll v. Safford, 3d How., 460.
Simmons v. Wagner, 101 U. S., 200.
16th Fed. Rep., 349.
People v. Shearer, 30th Cal., 648.
Gwynne v. Niswanger, 15th Ohio, 368.
Smith v. Ewing, 23d Fed. Rep., 744.
Astrom v. Hammond, 3d McLean, 108.
Carroll v. Perry, 4th McLean, 26.
Hughes v. U. S., 4th Wall, 232.
Union M. & Co. v. Dangberg, 2d Sawyer, 454.
Witherspoon v. Duncan, 71 U. S., 210.

The foregoing authorities definitely establish that the

tracts of land in said certificate described became private property and private lands, and were severed from the mass of the public domain, upon the delivery of said final certificate.

Upon the issuance of said certificate of purchase, said purchaser had a vested interest in the land; said land was the private property of said entryman; said entryman had a full and perfect equitable title thereto. His title was more than an equitable title; it was a vested right to the immediate transfer of the legal title; he was entitled under the law to the immediate issuance of patent therefor; said land was taxable, as owned in fee simple absolute by said entryman. In the case of the death of said entryman before the issuance of patent therefor, the land described in said certificate would descend to his heirs as realty. Said land could be conveyed by said entryman by deed of warranty and transfer the title thereto to the same effect as if the patent had issued.

Wirth v. Branson, 98 U. S., 118.

Benson Mining and Smelting Co. v. Alta Mining and Smelting Co., 154 U. S., 248.

Deffenback v. Hawke, 115 U. S., 392.

Yosemite Valley Case, 15 Wallace, 77.

Johnson v. Townsley, 13 Wallace, 72.

Frisbie v. Whitney, 9 Wallace, 127.

Myers v. Croft, 13 Wallace, 291.

It is established beyond question by the decisions of this Court that the tracts of land bought and paid for and for which certificate is issued and delivered by the receiver of a United States Land Office, become, by said acts, then and

there, private property and private lands, and that the same are severed from the mass of the public domain. No officer of the Land Department is authorized by law to take any action or exercise any authority over private property of any description, and the authority of the Secretary of the Interior in regard to lands is limited to public lands:

"The Secretary of the Interior is charged with the supervision of public business relating to the following subject:

* * * * * *

"Second. The public lands, including mines."

Section 441 Revised Statutes of the United States.

"The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all exclusive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government."

Section 453 Revised Statutes of the United States.

In some cases the effect of these decisions have been sought to be set aside by claiming that this Court meant that such status of lands only followed entry, payment and issuance of certificate when made by such entryman in good faith, and after full compliance with the spirit as well as with the letter of the law, this reasoning is plainly untenable, for who is to say or decide whether the entryman has acted fraudulently or against the spirit of the law under which his entry is made; not an executive branch of our Government

but the courts, for the land department of the United States is a branch of the executive department and exercises only such *quasi* judicial functions as are expressly conferred by law, and that authority has been exercised to its full extent when proof and payment have been offered, received, acted upon and a decision favorable to the entryman reached, and the same evidenced by the issuance of a final certificate. Anything further in relation to said entry, other than may appear upon the face of the papers transmitted by the local officers to the Commissioner of the General Land Office, over which only the Commissioner has supervisory powers under the law, such as questions of intent, fraud, etc., and requiring the institution of a new proceedings to establish, is entirely within the jurisdiction and authority of the judiciary.

The Courts uniformly decide that the only thing to be done by the officers of the Land Department after the receipt of the money and the issuance to the entryman of the duplicate receipt is a "mere ministerial act," which necessarily precludes the idea of jurisdiction existing in said officers to hear, try or determine any question of fact, not shown upon the records of the Land Office nor in the proceedings or proof pertaining to the entry.

"A ministerial act is an act performed in a prescribed manner in obedience to the law or the mandate of legal authority without regard to or the exercise of the judgment of the individual upon the propriety of the acts being done."

Section 658, Mechem on Public Officers, and notes.

Butterworth v. United States, 112 U. S., 67.

II.

"The Court below erred in deciding that the Commissioner of the General Land Office or any other officer of the Land Department of the United States had jurisdiction to pass upon charges of fraud or to consider them at all against the land entry of Henry C. Hackley."

The Land Department of the United States is not endowed with any authority of law to institute an original proceeding before any of its officers for the purpose of trying and determining whether or not fraud has been committed by any person in relation to any contract or any subject. The question as to the guilt or innocence of a party charged with fraud is a purely judicial question, and can be tried and determined only in the Courts of the United States.

Hughes v. U. S., *supra.*

Moore v. Robbins, 96 U. S., 522.

An action the object of which is the cancellation of a contract or a written instrument upon the ground of fraud, is cognizable only in a Court of Equity; the proceeding instituted in the Land Department in this cause was for the cancellation of an instrument issued by authority of law and after proceedings regular upon their face upon the ground of fraud committed by said entryman, and the end thereof and the purpose for which such proceeding was instituted, was to deprive a citizen of that which the Courts uniformly declare to be his private property.

The Constitution of the United States contains the following provisions:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." * *

"The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." * * *

"No person shall be held to answer for a capital or otherwise infamous crime unless * * * nor shall he be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty or property without due process of law." * * *

The action of the Land Department in instituting a proceeding for the cancellation of the entry involved in this cause, the taking of testimony, the consideration of the same, and the passing of judgment, was an attempted exercise on the part of said Department of judicial powers; as alleged in the bill, the proceeding instituted was called a cause or action, and entitled by the Department "The United States v. Henry C. Hackley, Stephen S. Bailey et al.;" it was commenced by said Department by issuing a summons directed to said entryman and to the transferees mentioned, directing them to appear before the Land Department of the United States within sixty and ten days from the date of summons and show cause why said entry should be sustained, under penalty upon their failure so to do of judgment being passed against them, the effect and nature of which judgment would be the final cancellation of said entry, and the forfeiture of the money to the United States of all moneys paid as fees and the purchase

price of said land; in order to show cause why said entry should be cancelled it was absolutely necessary for the Government of the United States to secure the attendance of witnesses before said Land Department, and in order to rebut their testimony it was equally necessary for the transferees to secure the attendance of witnesses; it involved the necessity of the examination and cross-examination of witnesses, and the consideration of the testimony by them submitted on the part of the officers of the Land Department of the United States; it was in its very nature a judicial proceeding and an attempted exercise of judicial power.

The language used in the third article of the Constitution in the distribution of powers to the legislative, executive and judicial branches of our Government is mandatory, and it is not within the province of Congress to confer powers of the one branch upon another.

Martin v. Hunter's lessee, 1st Wheaton, 327.

"Private rights may be interfered with by either the legislative, executive or judicial department of the Government. The executive department must in every instance show authority of law for its action, and occasion does not often arise for an examination of the limits which circumscribe its powers."

Section 436, Cooley's Const'l Limitations.

Due process of law, as used in the Federal Constitution, means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there

must be a tribunal competent by its constitution, that is, by the law of its creation, to pass upon the subject matter of the suit.

Pennoyer v. Neff, 95 U. S., 714.

In order that the legal proceedings may be according to the rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights, the tribunal must have authority to issue compulsory process to secure the attendance of witnesses, and the further power to issue attachment and punish for contempt.

United States v. Williams, 4th Cranch's Cir. Ct., 385.

The Land Department of the United States has no power to compel the attendance of witnesses, issue attachments or punish for contempt.

See decisions by Secretary Noble, dated July 20th, 1889.

Volume 9, Public Land Decisions, pages 133 and 134.

"It cannot be said in this case, as in the case of Budd, that the Government had the right to cross-examine the transferee or the entrymen, because none of them were produced as witnesses at the trial, and there was no power on the part of the Government to compel their attendance. Their testimony could only be obtained by their voluntary appearance and offering themselves as witnesses, which no man is willing to do when his testimony, truthfully given, will show that he has obtained valuable property in violation of law. The

case of Budd was tried in court, where those unwilling could be compelled to appear and give their testimony."

Record, pages 77 and 78.

Here was a case involving property rights of the value, to appellants, of more than One Hundred Thousand Dollars, and yet the tribunal before which the pretended trial is had confesses itself to be without power to secure the attendance of witnesses on behalf of the Government, and it was equally powerless to compel the attendance of witnesses desired by appellants; yea, more, it was without the power to maintain order during the hearing, or to compel a witness to answer questions, should he desire to refuse to do so.

There is no provision of law whereby an executive officer can commence an action in the name of the United States as plaintiff, for the purpose of setting aside or annulling any of its contracts, its obligations or its most solemn instruments, such action to be heard and determined before such executive officer or some member of the same department, as was done by the Commissioner of the General Land Office in relation to the entry under consideration, and were such law passed by Congress attempting to give authority, such law would be unconstitutional and void in that it would be an attempt to confer upon an executive branch of the Government powers exclusively belonging to the judiciary under the Constitution of the United States; because it would authorize a proceeding the object of which would be to deprive a person of property without due process of law, which is contravention of Art. V., Amendments to the Constitution of the United States.

"If the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations or its most solemn instrument, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States."

United States v. San Jacinto Tin Co., 125 U. S., 273.

We are well aware that this Court has, in some cases, decided that the Land Department has authority to cancel an entry after the issuance of a final certificate; but we maintain that no such decision has been given by this Court under such facts and circumstances as are presented in the cause at issue, nor do we recall any case which has been considered by this Court from the standpoint of constitutional rights. Many supposed this practice of the Land Department to be very ancient, but such is not the fact; a carefuwl examination of the reports of the decisions of the Department of the Interior discloses the fact that prior to the year 1880, but one case is reported in said Department with the title of the United States as plaintiff, and that one was the United States v. the State of Oregon. From 1880 until 1885 such action was very infrequent, and it was only upon the accession to office of William A. J. Sparks, as Commissioner of the General Land Office in the year 1885, that such actions became in any way common. It is needless to call the attention of this Court to the insane desire of said Commissioner to cancel all entries of every kind and description which he found pending in his department or which were made during his incum-

bency, or to the fact that under his order not a single patent was issued for any entry of public lands of the United States for a period of about one year, and until his non-administration and execution of the laws governing him and his department became so intolerable to the people of the public land, states and territories, that, in response to their universal complaint, the Honorable Secretary of the Interior requested and obtained his resignation, for all this is matter of history with which, no doubt, this Court is familiar; but he left a legacy of suspicion and distrust among the working force of said Department which has culminated in a sort of emulation among the staff thereof, as to which can cause the cancellation of the greatest number of entries, and that irrespective of all questions of law, right or justice. We are told in some of the decisions of some of the courts that were questions of fraudulent entries of public lands of the United States to be tried in the Courts, the expense and delay would be too great; in answer to this we will say that the question of expense and delay, were such a fact, have no right to be considered when opposed to the constitutional rights of citizens, and further, that the delay and expense attendant upon a hearing in the Land Department of the United States is in all cases at least double and in some cases ten-fold the expense and delay incident to a trial of the same cause in our Courts.

We therefore conclude that the Land Department of the United States exceeded its jurisdictional powers in suspending said entry, in ordering said hearing, in taking testimony therein and considering said testimony, and therefore that

the cancelling the entry of said Henry C. Hackley was a void act, and that L. Edgar Diller, appellee, acquired no right by reason of his said entry and the issuance to him of said United States patent, that is not subject to the paramount rights and equities of appellants.

III.

The Court below erred in deciding that under sections 2450 and 2451 of the Revised Statutes of the United States the consideration and adjudiction upon the entry of Henry C. Hackley could be considered at all by other than a board consisting of the Secretary of the Interior and the Attorney General.

There are two modes of attacking an entry after the issuance of duplicate receipt or final certificate recognized and provided for by the practice of the Land Department of the United States; one is by contest, which is instituted by a citizen claiming some interest or right in the land, and by making such interest or claim known to the Land Department by means of affidavit of himself and of one or more corroborating witnesses; the other is by suspension, which is always initiated by the action of the Commissioner of the General Land Office, and is presumably done, in all cases in the interest of the United States. It is admitted that the case at bar was a suspended entry, and in the event that Congress has specifically provided that cases of suspended entries of public lands should be submitted and subject to a certain and defined line of procedure, and should be subject to the decision of certain named officers, we claim that any departure from such prescribed rules would vitiate and render null any decision or order which

might be made against any such suspended entry. Section 2450 of the revised statutes of the United States reads as follows:

"The Commissioner of the General Land Office is authorized to decide upon principles of equity and justice as recognized in Courts of Equity, and in accordance with regulations to be settled by the Secretary of the Treasury, the Attorney General and the Commissioner, conjointly, consistently with such principles, all cases of suspended entries of public lands and of suspended pre-emption land claims, and to adjudge in what cases patents shall issue on the same."

Section 2451, Revised Statutes of the United States reads as follows:

"Every adjudication shall be approved by the Secretary of the Treasury and the Attorney General, acting as a board; and shall operate only to divest the United States of the title of the lands embraced thereby, without prejudice to the rights of conflicting claimants."

Section 2452 directs the Commissioner to report to Congress the adjudications made; section 2453 directs the Commissioner to arrange his decision into two classes; the first class to embrace all such cases as may be finally confirmed by the board, and the second class to embrace all such cases as the board reject and decide to be invalid; section 2454 provides that patents shall issue to the claimants for all lands in the first class, and that all lands in the second class shall revert to and become part of the public domain.

Section 2457 Revised Statutes reads as follows:

"The preceding provisions, from section twenty-four hun-

dred and fifty to section twenty-four hundred and fifty-six, inclusive, shall be applicable to all cases of suspended entries and locations, which have arisen in the General Land Office since the twenty-sixth day of June, eighteen hundred and fifty-six, as well as to all cases of a similar kind which may hereafter occur, embracing as well locations under bounty land warrants as ordinary entries or sales, including homestead entries and pre-emption locations or cases; where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained; and where the rights of no other claimant or pre-emptor are prejudiced, or where there is no adverse claim."

Sections 2450-2455, inclusive, were first enacted by Congress August 3rd, 1846, with a limitation of two years, in 1848 were continued for one year and were subsequently reenacted without limitation as to time and became a portion of the revised statutes of the United States. Section 2456 was passed March 3rd, 1853, and section 2457, June 26, 1856. It will be observed that the history of this law shows that Congress must have entertained grave doubts as to the advisability of conferring this power upon said officers, and its passage took from the officers of the Land Department any and all right of action upon suspended entries, which it might previously have had in cases of suspended entries, under general supervisory powers.

It is true that the Land Department has acted under this law only in creating what it calls a board of equitable adjudi-

cation to which it has submitted such cases as are mentioned in the last clause of section 2457 thereby limiting and abridging said law to cases which necessarily fall within the first class provided for in section 2453, evidently interpreting said law to cover only such cases of suspended entry as must be necessarily approved; that such is not the intent of the law and could not have been intended by Congress so to be is shown by the evident caution of Congress and its hesitation in making it a permanent law, for the class of cases provided for by said clause should evidently be all confirmed and the power so to do could work no injustice to either the Government or the individual; that such limitation was not intended is further shown by the fact that said law is made specifically applicable to all suspended entries, either then pending or which might in the future arise; that such limitation was not intended is further shown by the fact that Congress directs not only the report of confirmed entries, but also of rejected and cancelled entries, and were such cases limited to those specified in said last portion of section 2457 the provision for the second class provided for in section 2453 would be wholly inoperative.

We are aware that great respect is shown by the Courts and due consideration given of the construction placed upon laws by the officer whose duty it is to carry the same into effect, but this Court has uniformly refused to recognize and follow the construction and interpretation of laws by the heads of the several executive departments where such construction and interpretation is manifestly erroneous.

"The practice or opinion of the Land Department can in

no manner control the opinion of the Court; the Court must decide according to the law."

Irvine v. Marshall, 61 U. S. 558.

In the case of Foley v. Harrison, 56 U. S., 433, the Defendants claim title under five patents issued from the General Land Office on the 1st of September, 1847, and purported to be issued under said Act of Congress of August 3, 1846, and were founded upon locations made by Defendants, receipts issued therefor, and subsequently suspended by the order of the Commissioner of the General Land Office. The Court in its decision recites the fact of suspension, the fact that the same were considered and patents issued under said Act of August 3, 1846, and cites, in general, the provisions of said Act; the fact that the Commissioner reported that said entries had been heretofore suspended and that they have been adjudicated by him and placed in the first class under the Act of August 3, 1846; that the report was agreed to by the acting Secretary of the Treasury and the Attorney General. In deciding in favor of the Defendants after the above recitations the Courts say:

"As this decision was made by a special tribunal, with full powers to examine and decide; and as there is no provision for an appeal to any other jurisdiction, the decision is final within the law." * * * * * * *

"And these were the entries included in the above report of the Commissioner of the General Land Office, and sanctioned by the Secretary of the Treasury and the Attorney General."

Can it be supposed that the Court would have given valid-

ity to these patents, in the event that the report of the Commissioner of the General Land Office had been approved by the Secretary, or by the Attorney General alone? Said law requires the Secretary and the Attorney General to approve the decision of the Commissioner acting as a board.

We therefore conclude that if the entry of Henry C. Hackley was a suspended entry, the Secretary of the Interior had no authority of law to reverse the decision of the Commissioner of the General Land Office, and that said decision of said Commissioner could be reversed only by the Secretary of the Interior and the Attorney General so deciding, acting as a board.

We claim that said act of June 3d, 1878, protects *bona fide* purchasers of timber entries from an entryman under the provision contained in the latter portion of said Act:

"And any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void."

Said timber entry of Henry C. Hackley was made and perfected in April, 1883, and the other eleven entries were all made during the spring and summer of said year; more than four and one-half years thereafter, during which time nothing had been done to cast any suspicion upon said entries, these appellants bought all of the land embraced in said entries. There was no attempt on the part of the Government at any stage of the proceedings in this cause to even cast a suspicion upon the good faith of these appellants throughout this transaction. The Honorable Secretary of the Interior, in his opinion, says:

"There is no charge, nor is there any testimony affecting the transaction between Bailey and Alger and Hawley."

V.

"The Court below erred in not deciding that under the Act of Congress of June 3d, 1878, known as the timber and stone Act, upon proof being made to the satisfaction of the local Land Office, it is mandatory upon the Commissioner of the Land Office to issue patent therefor."

Section three of said Act, after providing for posting and publication for a period of sixty days and no adverse claim being filed, states that the applicant shall furnish to the register of the Land Office satisfactory evidence, first, that the notice of application was duly published as herein required; second, that the land is of the character contemplated in the Act, unoccupied and unimproved, and that the same is non-mineral; and upon payment therefor the purchase money and fees, that the applicant be permitted to enter the tract, "And on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon; *provided,* that any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands held by him, stating the nature of his claim thereto;" then follows provision for the taking of evidence on said objection.

The language used is unambiguous and mandatory; it says that patent *shall* issue, and the only exception stated in the Act is in the event of some person filing a claim in writing asserting an interest in the land. There is no claim that such was done in this cause. All the proceedings shown by the

papers transmitted were in strict compliance with the law; the proofs submitted were satisfactory to the officers to whom was delegated, by Congress, the authority to pass upon the same; it was claimed that the land embraced in this entry was not of the class and character contemplated by said Act and not properly enterable thereunder, and the hearing was had solely upon this question and the decision of the Secretary of the Interior finds for the entryman and transferees upon this point.

(See Record, page 71, opinion of Secretary).

For proceedings and proof submitted in the original entry of said claim see Exhibit —C—, Record, pages 60-68, inclusive.

The issues presented in the notice to transferees of the hearing before the Land Department, which was in the nature of a complaint against said entry of Henry C. Hackley and said eleven other entries were first, that said entries were made in the interest of third parties, and, second, that the land was agricultural in character and not subject to entry under the Act of June 3, 1878.

Record, page 70.

These two matters were affirmed by the Land Department and the burden of proof was upon the Government; that this was so considered is shown by the fact that in this cause, as in all others of similar nature in the Land Department, the Government opened the case by introducing witnesses to substantiate the allegations of the complaint. During the entire three months consumed in the hearing no witness was introduced on behalf of the Government to support the first allegation. and the attorney for the Government repeatedly stated to coun-

sel for app ellants during said hearing, that he could not prove and did not intend to try to prove the allegations of fraud. Exhibit "D," Record, pages 68-80, inclusive, recites the occupations and residence of a number of these entrymen, showing that they were available as witnesses and could have been produced by the Government upon the witness stand had not the counsel for the Government ascertained by inquiry that the evidence of each of said witnesses would have been antagonistic to the Government. What is disclosed as to the character, occupation and standing of these men who are accused of entering into a scheme to enter lands fraudulently, and who are accused of committing perjury in furtherance of their fraud? We find it stated that Wayne W. Holcomb is an attorney at law and had been representative in the Legislature from Yakima County, Washington; that Edwin L. Chalcraft was a civil engineer in Seattle; William Gilmore was a merchant at Edison, Skagit Count, in said State; Henry McBride was a school teacher and now an attorney at law; Henry Brandon was engaged in driving a delivery wagon for Schwabacher Bros. of Seattle; that Edward Crome was an assistant surveyor; that Winfield S. Wilson was engaged in a restaurant in Seattle; that Henry C. Hackley assisted in surveying, and was afterwards a contractor on a road near Lake Washington; that William L. Rogers was a farmer at Edison, and John L. Leslie worked in a barrel factory in North Seattle.

Record, pages 73 and 74.

It is a fact well known to the counsel for the Government, at the time of the hearing in Seattle, that Wayne W. Holcomb was then practicing law in the City of Seattle where said hear-

ing took place; that Edwin L. Chalcraft was then in the employ of the Government as a school teacher upon the Puyallup Indian Reservation, within twenty-five miles of the City of Seattle; that William Gilmore was a merchant at Edison, and conducting his business within twenty miles of the land in dispute; that Henry McBride was then practicing law at La Connor, Skagit County, Washington, and of sufficiently good standing to be elected Judge of the Superior Court of his County for two terms immediately succeeding the admission of the State; Henry C. Hackley's whereabouts at that time is shown by his testimony, pages 41-54, inclusive, Record. The other entrymen were shown to be honest, hard working men. It seems to us, and we think it will seem to this Court, a monstrous act of injustice that men of such standing should be branded as perjurers and frauds by the Secretary of the Interior without one word of testimony before him upon which to found his judgment, and solely as his inference, drawn from the fact that they sold lands entered by them at a time that the law, and decisions of this Court declare that they had a right to sell.

"The Government offered no testimony in chief to support the allegations that said entries were made in the interest of said transferees, other than what might reasonably be inferred from the records, showing dates of said entries and transfers thereof."

Record, page 71.

The Secretary in said Decision says:

"This holding in nowise conflicts or interferes with the right of a purchaser in good faith of land under the Act, after he acquires title, to sell the land if he desires so to do. Sales

made soon after purchase, however, if unexplained, have a tendency to arouse suspicion in the mind that when the entry was made it was not for the entryman's own exclusive benefit and use."

Record, page 76.

That is, the Secretary of the Interior in this cause decides that while the entryman after payment and receipt of a certificate has a right to sell the land embraced in his entry, no person has a right to buy the same, and if he does buy, and some agent of the Government reports that the entry was fraudulent, without a word of testimony to substantiate that allegation, the entryman must produce himself as a witness before the Land Department and under oath disclose to said Department the motives which prompted him, years before, to make the application to purchase the land, and this under penalty upon failure so to do, of being branded as a perjurer and guilty of a felony, and his transferee must lose that which he honestly bought and paid for.

One of the greatest surprises, however, in this cause was the decision of the Secretary of the Interior, apparently sanctioned by the United States Circuit Court of Appeals for the Ninth Circuit, that notwithstanding the Government had accused the entrymen of crime, had wholly failed to introduce a scintilla of evidence to substantiate that allegation, because the entrymen were not introduced as witnesses to prove their innocence, they were therefore guilty. We had supposed that the presumption of law of the innocence of the entrymen was absolutely conclusive, until that presumption was in some degree rebutted by evidence; we had supposed that when action was

brought in any court the allegation against the defendant must be proved, before the defendant could be called upon to rebut such allegation. The lower Court holds that the Secretary of the Interior in considering this cause had a right to infer fraud, Record, page 97; to our mind he would have had equal right to infer the entrymen guilty of any or all the crimes mentioned in our statute books, for this is the first instance that we have ever seen or heard of, where any judicial officer undertook to pronounce a man guilty of crime, without any testimony in relation to such crime, or that any crime had been committed, and upon evidence submitted upon an entirely different subject.

The Secretary of the Interior seeks to evade the force of the decision in the case of the United States v. Budd (144 U. S., 154), but his effort is entirely unsuccessful; the last cited case was decided by this Court immediately after the Commissioner of the General Land Office had rendered his decision in this cause, and the Court will recall that said case reversed the practice which had obtained in the Land Department in the classification of lands as timber or agricultural, holding, in effect, that lands in a state of nature, more valuable for timber growing thereon than for agricultural purposes, were enterable under the Act of June 3, 1878, notwithstanding the soil might be capable of raising crops after such land was cleared and reduced to a state of cultivation; the decision in this respect was so clear and so evidently in accordance with the intention of Congress, that the Land Department recognized the fact that it would be impossible, under the testimony submitted in this cause, for it to cancel the entries before it for consideration, without having its decision set aside by the

Courts; as hereinbefore stated, about three years elapsed before this decision was promulgated, and we think that this Court after reading the opinion of the Secretary cancelling the twelve entries, will agree with us in the opinion that if this Court had not established the law as to timber and agricultural lands, nothing would ever have been heard from the Department regarding the fraud of these entrymen.

The Secretary of the Interior attempts to found his decision in part upon the testimony upon cross-examination of J. Theodore Lohr, a witness introduced by the transferees.

Record, pages 73-76, inclusive.

The Honorable Secretary in his said opinion in said cause quotes very freely from the testimony upon cross-examination of this witness, inserting in the opinion everything said by said witness that could be warped into anything seemingly damaging to the interests of these appellants; but upon reading these quoted statements the Court will find that this witness testified in regard to every one of said twelve entries, that the entryman, so far as witness knew, had made no contract or agreement, either oral or in writing, whereby the title to the land he sought to acquire from the Government was to inure in whole or in part to the benefit of any person except said entryman; that no one of said entrymen, to his knowledge, had given any mortgage or other security upon the land entered; that each and every one of said entrymen was perfectly free to keep his land or sell the same, at his pleasure, after perfection of entry; that in no instance did he secure a promise, or attempt so to do, from any one of said entrymen, that such entrymen should sell to him, Lohr, or to any one else. Lohr was one of a class

of men numerous in the public land states and territories known as cruisers, whose business it is to inform themselves of the location of Government lands, whether agricultural or timber in character, and to sell the knowledge acquired to persons desiring to enter public lands, and who have not the time to make investigation for themselves. It has always been the practice of people following this calling to make exertions to find people who desire to enter lands and thus obtain a purchaser for their stock in trade, to-wit, the knowledge of lands aforesaid. Lohr's testimony discloses the fact that he did what any one of his calling would have done in the premises, and we have never heard that this calling was other than legal, just and honorable. It is as he said in his testimony, he negotiated the purchase of these claims, after consummation of entry as he would have negotiated the purchase of any other claims; these entrymen were under no manner of obligation to sell through him, or at all, any more than the entryman of any other tract of land would be.

The process of reasoning by the Secretary of the Interior in arriving at his decision, when stripped of verbiage, is as follows:

The Government charged fraud; the Government submitted no testimony whatever to substantiate the charge; the entrymen failed to present themselves as witnesses to swear that they were innocent, therefore they were guilty; the entrymen sold the land, embraced in their entries, after they had perfected the same, as they had a perfect right to do, therefore they are guilty; a witness was introduced by the defendants, appellants, who was questioned, on cross-examination, by the

Government as to whether or not these entrymen or any one of them made his entry for the benefit of any other person than himself, to which question the answer is, no, but that as far as witness knows each entry was made strictly in compliance with the law, *therefore,* each and all of said entrymen are guilty of fraud and perjury; and then, as though not satisfied with the conclusiveness of his reasoning, he adds that he *infers* that each of these entrymen is guilty of fraud and perjury and that each of said entries shall therefore be cancelled. We know the rule of the courts which takes as conclusive findings of fact made by an executive officer, but we claim, first, that the question of fraud is a mixed question of law and fact; secondly, that in a case like the one at bar, where the decision itself shows that the finding has no evidence upon which to base it, that the Court will not find or hold such finding as conclusive. It seems to us that if there ever was a case decided in an arbitrary manner by the Land Department of the United States, this is one, and would come fully under the remarks in regard to the arbitrary and unlimited actions on the part of the Land Department used by this Court in Cornelius v. Kessel, 128, U. S., 456.

In endeavoring to evade the force of the opinion of this Court in United States v. Budd, *supra*, the Secretary endeavors to draw a distinction between the evidence required to set aside or cancel a patent and that required to set aside a final certificate, condemn a person as a perjurer and forfeit his money; we cannot but regard his argument in this respect as illogical, and based upon a misinterpretation and misconstruction of the law. He endeavors to draw a further distinc-

tion in that in the Budd case the allegation of the complaint was that the entry was made under an agreement to sell the land entered by him in violation of the statute, and that it was not charged in said complaint that he had applied to purchase said land on speculation, and therefore no evidence could be submitted by the Government in the Budd case to show that the entry was made on speculation; but the allegation against the entry now under consideration was identical with the allegation against the Budd entry, and nothing was ever heard of the question of speculation in any of the proceedings in this cause until said opinion of the Secretary was promulgated. But what is meant by the term "speculation" in said Act? The Act in this particular reads as follows: "That he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit."

Section 2, Act June 3, 1878.

Does this mean that if a man enters land under said law with the expectation and intention of bettering his financial condition, by holding the same for an indefinite period, by cutting the timber therefrom and selling it, or by selling it when he has a right so to do, that he is guilty of fraud under the law? We think not, for as an antithesis to the term speculation, we find the phrase "But in good faith to appropriate it to his own exclusive use and benefit," which we understand to mean that the proceeds of the land so entered, however, or whenever produced, after final entry, shall belong to and be the property of the entryman himself. If it means other than this we will venture the assertion that there has never been a valid entry made under said law.

We would respectfully call the attention of the Court to the testimony of Stephen S. Bailey submitted in this cause, Record, pages 29-41, inclusive, and to the testimony of the entryman, Henry C. Hackley, Record, pages 41-54, inclusive. The testimony herein submitted by these witnesses carries conviction of the honesty and good faith of the transactions in relation to the lands above described upon its face. The Court may say that this litigation would have been useless had this testimony been submitted in the Land Office, and that appellants are guilty of laches in not producing the same at the hearing; but for reasons heretofore given we did not and do not now consider that the introduction of witnesses to prove innocence would have been proper or in any event can be necessary, in the absence of proof of guilt.

The Honorable Secretary in his said opinion says:

"On the other hand, if these men made their entries for their own use, and not on speculation, or in collusion with Bailey, there was every inducement on his part to call upon them, and every moral obligation on their part to respond. They were peculiarly his witnesses."

Record, page. 78.

The Secretary in the foregoing assumes the guilt of Bailey and the entrymen in inferring that said entrymen were under the control of Bailey; this is shown from the fact already herein quoted from said opinion, that the Government was powerless to secure the attendance of witnesses at the hearing; what power greater than that possessed by the Government had Bailey or appellants to secure the attend-

ance of witnesses, unless the assumption of the Secretary was correct? In any event, we cannot comprehend why witnesses should be called to rebut anything concerning which no testimony had been submitted. He speaks of the damaging disclosures of Lohr, but we deny that Lohr made any damaging disclosures, for his testimony before alluded to and quoted by the Secretary is direct and positive in denying and refuting the charge that these entries were made at the instance of or for the benefit of said Bailey or any other third party. Bailey's acquaintance and connection with said entry of Henry C. Hackley is shown in the Record, pages 29 and 30; as to whether Mr. Lohr was to locate these men, given upon cross-examination by appellee's solicitor, Record, pages 38-40, inclusive.

It appears from the testimony of Bailey (Record, page 32) that he purchased fifteen or sixteen claims through Mr. Lohr, but there is no evidence as to any action ever taken by the Government in relation to the remaining three or four claims; there is no doubt but that Mr. Lohr showed many other claims to other entrymen during the year 1883, for this was a period of great activity in the entry of timber lands in this section of country, thousands of claims being entered during that year in the Puget Sound Basin. This was caused by the activity of purchasers of timber lands, and during this period the purchaser was obliged to act quickly and consummate his purchase as soon as possible after entry in order to secure what he desired. This explains the reason why so many entries were purchased immediately or soon after the issuance of the final certificate, and we are safe in the assertion

that the great majority of all entries made under said law were so purchased. We are well aware that many entries have been made under the timber law, and are still being made in all probability, by persons in the employ of, and upon the solicitation and for the benefit of mill companies and large capitalists; but we have never known, and we think the Court has never known of instances where this has been done by contractors, surveyors, lawyers, members of legislatures and men following honest and legitimate labor for a livelihood; the evident standing of the men who made these entries should have been sufficient to have made the Honorable Secretary of the Interior hesitate before branding them as frauds and perjurers, and we claim that had Lohr's testimony been direct and positive that each had made an agreement to sell his claim before entry, that his unsupported testimony would have been insufficient to overcome the presumption of innocence, for we further claim that the fact of transfer soon after entry not only requires no explanation, but that no one has a right to demand an explanation, for in transferring at the time they did they did what they had a right to do under the law, under the decisions of the Land Department, and under the decisions of this Court, and an act legal, just and right cannot be taken and should not be considered as evidence of a crime.

In the discussion of this question we may have used language that will seem strong in animadverting upon the action of the Honorable Secretary of the Interior, but we have done so without intention of disrespect to that high office or to the honorable person who occupied the same when

his name was appended to this decision, for we well know, as the Court know, that the duties cast upon the occupant of that office are so very great that his personal attention is not given to the thousandth part of the business ostensibly before him, and decisions bearing his name; we well know the hundreds of cases every month in the Land Department which he is supposed to decide; we know the many questions that are under his supervision as Chief of the Indian Bureau; we recall the questions arising in the patent office, as well as the army of clerks under him in the Pension Department, and we have no question but that neither the Honorable Secretary of the Interior nor his Assistant Secretary for the Land Department read the testimony submitted in this cause nor the decision itself; the probabilities are overwhelming that this decision was written by some clerk of the Department, and when ready for signature was appended at the request of said clerk and without the signer reading a word of the same. We venture this assertion for the further reason that we have seen decisions so signed in the Land Department at Washington on several occasions, and we have no doubt some of the members of this Court personally know that this is common in said Department. We call the attention of the Court to this practice for the reason that the Honorable Secretary of the Interior whose name is appended to this opinion is an eminent lawyer, and could we believe that he read and considered the evidence submitted and thereupon gave this opinion we would entertain much more respect therefor.

In conclusion we respectfully pray this Honorable Court

to reverse the decision of the lower Court herein for the following reasons, to-wit:

1st. We were entitled under the Act of June 3, 1878, to a patent for the lands described in the entry of Henry C. Hackley immediately upon the transmission of the papers and proofs to the Commissioner of the General Land Office, said papers and proofs being regular upon their face, and no person objecting thereto having a valid claim to any portion of the land.

2nd. The Commissioner of the General Land Office is an executive officer, and had no authority in law to suspend said entry.

3rd. No officer of the Land Department of the United States, a member of the executive branch of our Government, has any authority in law to commence an action or suit in the name of the United States as plaintiff, for the purpose of cancelling or altering any contract or writing, or for the enforcement of a forfeiture, nor for any other purpose.

4th. Under the law and the decisions of this Court, said land embraced in said entry became the private property of said entryman the moment final certificate was to him issued, and he was, then and there, fully vested with the right and power to convey the same as land; he did convey, and his grantee conveyed to appellants, whereupon said land became the property of appellants, and the action of the Land Department, if authorized by act of Congress, is nevertheless unconstitutional in that such act would be an attempt to give to the Executive Department powers vested by the Constitution in the judiciary; the same would be unconstitutional

because it would be depriving a person of property without due process of law; without due process of law for the reason that the pretended tribunal has no power to compel the attendance of witnesses, has no power to compel the answer of questions, and has no power to issue attachment against the person to enforce its mandates.

5th. If Congress has attempted to confer this power upon the executive officers of the Land Department, it has attempted to do so only by sections 2450-2457 of the Revised Statutes of the United States, inclusive, and the Honorable Secretary of the Interior entirely disregarded the provisions of said law in that he considered the action favorable to appellants by the Commissioner of the General Land Office, individually, and not as a member of a board.

6th. The Government charged fraud against said entry in that said entry was made at the instance and for the benefit of said Bailey and Lohr, and upon the trial the Government introduced no evidence to substantiate that allegation; all of the entrymen and transferees of said property were justified in considering that the Government had abandoned said allegation, and said defendants would not have been justified in attempting to establish innocence, which was conclusively presumed until such innocence was attacked by evidence submitted.

7th. Fraud is a mixed question of law and fact; therefore the finding of the Land Department thereon is not conclusive upon the courts; were it a question of fact under consideration, the same would not be conclusive upon the courts where the record before the court shows an entire ab-

sence of evidence upon which to found such conclusion or finding, and such is the same shown by the Record herein.

8th. The Honorable Secretary of the Interior had no authority in law or by precedent to infer fraud, for this fraud is more than *quasi* criminal, for fraud could not have been committed in these entries only through perjury committed by said entrymen, and no tribunal has a right to find a person guilty of crime, only upon a preponderance of the evidence submitted.

9th. Appellants are protected as *bona fide* purchasers by the express provision of the act of Congress under which said entry was made; all the officers of the Land Department who have passed upon said entries have found and expressly decided that said appellants were charged with no wrong, and the evidence submitted showed no wrong on their part. Said cancellation of said entry was in direct violation of the principles laid down in the case of United States v. Budd, *supra*.

10th. The allegations of the bill of complaint filed herein are admitted by the plea and answer of defendant, excepting in so far as the questions of law are concerned and the testimony of the witnesses, said S. S. Bailey and said Henry C. Hackley, together with the exhibits filed from "A" to "D," inclusive (Record, pages 29-68, inclusive), show the legality, regularity and good faith of said entry and the several transfers thereof.

11th. Equity and good conscience demands that appellants be not deprived of their property honestly and innocently acquired at a time when the law permitted them to acquire the same, and more than four and one-half years after

the Government had sold the same, by an action brought by the Government nearly six years after the perfection of the entries.

Respectfully Submitted,

CHAS. K. JENNER,

Solicitor for Appellants.

HAWLEY *v.* DILLER.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 116. Submitted February 2, 1900.—Decided May 28, 1900.

An applicant for public land under the act of Congress of June 3, 1878, 29 Stat. 89, c. 151, known as the Timber and Stone Act, must support his application by an affidavit stating that "he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or receiver of the land office within the district where the land is situated." The same act provides: "If any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and

Counsel for Appellant.

all right and title to the same; and any grant or conveyance which he may have made, *except in the hands of bona fide purchasers*, shall be null and void."

An entryman under this act acquires only an equity, and a purchaser from him cannot be regarded as a bona fide purchaser within the meaning of the act of Congress unless he become such after the Government, by issuing a patent, has parted with the legal title.

A construction of the above act long recognized and acted upon by the Interior Department should not be overthrown unless a different one is plainly required by the words of the act.

The result of the decisions of this court in relation to the jurisdiction of the Land Department when dealing with the public lands is as follows: (1) That the Land Department of the Government has the power and authority to cancel and annul an entry of public land when its officers are convinced, upon a proper showing, that the same was fraudulently made; (2) that an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and applied for the same, and in all respects complied with the requirements of the law; (3) that the Land Department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee; and (4) that redress can always be had in the courts where the officers of the Land Department have withheld from a preëmptioner his rights, where they have misconstrued the law, or where any fraud or deception has been practiced which affected their judgment and decision.

The principle reaffirmed that where the matters determined by the Land Office "are not properly before the Department, or its conclusions have been reached from a misconstruction by its officers of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected."

Sections 2450 to 2457 inclusive of the Revised Statutes, relating to suspended entries of public lands and to suspended land claims, and which sections require certain matters to be passed upon by a Board consisting of the Secretary of the Interior and the Attorney General, construed and held to apply only to decisions of the Land Office sustaining irregular entries, and not to decisions rejecting and cancelling such entries under the general authority conferred upon the Land Department in respect to the public lands.

THE case is stated in the opinion of the court.

Mr. Charles K. Jenner for appellants. *Mr. A. B. Browne* was with him.

No brief filed for appellee.

Mr. Justice Harlan delivered the opinion of the court.

This case involves a claim to a tract of land arising out of an entry made under the act of Congress of June 3, 1878, c. 151, entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada and in Washington Territory," known as the Timber and Stone Act. 20 Stat. 89.

The act in its first section provided for the sale at a named price and in quantities not exceeding one hundred and sixty acres to any person or association of persons of surveyed public lands in the States and Territory named, not included within the military, Indian and other reservations, and which were "valuable chiefly for timber, but unfit for cultivation." It also provided for the sale of lands "valuable chiefly for stone" on the same terms as timber lands.

By the second section of the act it was provided: "§ 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonging to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the

register or receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, *except in the hands of bona fide purchasers*, shall be null and void."

The third section, after making provision for the publication of the application to purchase, provides: "And upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May 10, 1872, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

The bill of complaint presents substantially the following case under the above legislation:

On the 30th day of April, 1883, after having complied with the requirements of the above act, one Henry C. Hackley paid to the receiver of the land office in Olympia, Washington Territory, the purchase price of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 13, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 12, all in township 36 north, of range 3 east, Willamette meridian, in the county of Skagit, Territory (now State) of Washington—taking from the receiver what is known as the final or duplicate receipt. On the same day Hackley conveyed the tract described to Stephen S. Bailey by a sufficient deed of warranty; and on December 29, 1887, Bailey sold, transferred and conveyed the land to the appellants.

Opinion of the Court.

On August 9, 1888, the Commissioner of the General Land Office suspended and held for cancellation the entry made by Hackley, it having been reported to that office by a special agent that the land in question was not chiefly valuable for timber, but was valuable agricultural land, and also that the entry by Hackley was made in the interest of Bailey.

On or about August 23, 1888, the register and receiver of the local land office at Seattle caused notice of the action of the Commissioner of the General Land Office to be served upon the transferees, the notice stating in detail the fact of the entry by Hackley, and that the special agent had reported that he had made a personal examination of the land and found that it was not chiefly valuable for timber, but was valuable agricultural land, and that the entry thereof was made in the interest of Bailey and others, and not for the benefit and use of the entryman.

Within sixty days after the above notice, the transferees made a special appearance by attorneys, and moved that the proceeding be dismissed and the entry reinstated and passed to patent, upon the ground that the action of the Commissioner was in excess of any authority possessed by him or by the Land Department. That motion was denied by the Commissioner. The bill alleges that such denial was not the result of the consideration of any fact or facts, but of an erroneous opinion of the law.

Thereupon the transferees applied for a hearing in accordance with the notice given, and they stipulated with the attorney for the Government that the case be consolidated with eleven other entries owned by them and which were suspended at or about the same time by the Commissioner.

That application was granted, and a hearing was had before the local land office.

The register and receiver being divided in opinion the matter went to the Commissioner, who decided that all the land embraced in the entries before him, including the land here in question entered by Hackley, was timber land that could be entered as such under the act of June 3, 1878; that all of the proceedings in relation to Hackley's entry were regular; that

the proof submitted on the entry was sufficient; and that the Government had failed to prove that that entry was made in the interest of Bailey or of any other person than the entryman. It was therefore ordered by that officer that the entry in question be removed from suspension and remain intact upon the records of the Land Department, and that the patent of the United States issue therefor.

Subsequently, January 31, 1891, no patent having been issued, Secretary Noble ordered the Commissioner of the General Land Office to certify and transmit all the papers and testimony in the cause to his office. "Said order," the bill alleged, "was made by the said Secretary of the Interior without any appeal being taken by the United States, and without notice to said transferees, or any of the defendants in said cause." The order was complied with, but the papers remaining in the hands of Secretary Noble without any decision being made by him while in office. The case was taken up by his successor, Secretary Smith, and was decided October 19, 1893, adversely to the transferees. *United States* v. *Bailey*, 17 L. D. 468. The bill further alleged: "Said decision of the Commissioner of the General Land Office, rendered in said cause as aforesaid, was at no time considered by the honorable Secretary of the Interior and the Attorney General of the United States, acting as a board or otherwise, nor was the testimony and proceedings in said cause by them considered or acted upon, as a board, at all; nor did the Attorney General of the United States at any time consider or act upon said decision of the Commissioner of the General Land Office, or the pretended testimony, or the papers and documents in relation to said entry, at all, either as a member of a board or in his individual capacity."

Throughout all these proceedings appellants protested that the Land Office was without jurisdiction or authority to cancel the entries of the lands that had been transferred to them.

In the course of his opinion Secretary Smith said that there was no charge nor was there any testimony affecting the transaction between Bailey and his transferees. He also said that his interpretation of the statute did not imply that a timberland entryman was not authorized to sell his entry at any time

that he chose after he had made his proof and received his certificate. 17 L. D. 468, 471, 476.

In accordance with the directions of the Secretary, the Commissioner of the General Land Office, on November 21, 1893, ordered the cancellation of the timber-land entry of Hackley upon the records of the Land Department, and the land was held subject to entry as public land of the United States.

Thereafter Diller, the present appellee, made entry of and purchased the land in question under the above act of June 3, 1878, and a patent therefor from the United States, bearing date October 15, 1895, was issued to him.

On February 21, 1896, the plaintiffs, now appellants and the transferees of Bailey, brought this suit against Diller in the Circuit Court of the United States for the District of Washington, Northern Division. The bill, after setting forth the above and other facts, alleged that the action of the Land Department in regard to the entry in question was without authority of law and that the patent to Diller was wrongfully issued.

The relief asked was a decree holding the patent of the defendant to be a cloud upon the title of the plaintiffs, adjudging that the defendant held the title in trust for them, and requiring him to convey to them whatever title he might have obtained or acquired by virtue of such patent; that the title of the plaintiffs to the land be forever quieted against the defendant; and that such further relief be granted in the premises as might be equitable.

A demurrer to the bill having been overruled, the defendant filed both a plea and an answer. After referring to the hearing before the receiver and the register, resulting in a division of opinion between those officers, the plea recited as a defence the history of the proceedings as above stated, and the entry of the land and the issue of a patent to the defendant after the cancellation of Hackley's entry. The plea was overruled. In his answer the defendant questioned the good faith and sufficiency of the conveyances from Hackley to Bailey and from Bailey to the plaintiffs. A replication was filed by the plaintiffs in which they asserted the truth and sufficiency in law of their bill, and

made a countercharge of insufficiency, untruthfulness and uncertainty as to the defendant's answer.

Upon final hearing in the Circuit Court Judge Hanford held that where land had been regularly entered under the act of June 3, 1878, it was not subject to forfeiture after it had been conveyed to a *bona fide* purchaser; that the opinion of the Secretary of the Interior showed that the original entry in question was cancelled solely because it was deemed fraudulent, and no consideration whatever was given to the rights of the plaintiffs as *bona fide* purchasers; and that the evidence clearly showed that the plaintiffs were *bona fide* purchasers within the meaning of the act of Congress referred to. The Circuit Court was also of opinion that "the case in the Land Department, after the entry had been suspended, should have been adjudicated by the board composed of the Attorney General, the Secretary of the Interior and the Commissioner of the General Land Office, as provided by sections 2450 and 2451, Revised Statutes, and the Secretary of the Interior, without a determination of the board, could not lawfully cancel the entry." A decree was therefore entered adjudging the plaintiffs to be the equitable owners in fee and entitled to the lands described in the bill; that the patent issued to the defendant Diller for the land in question was issued improvidently and without authority of law, was a cloud upon the title of the plaintiffs, and should be removed; and that whatever title might have accrued under or through such patent was held by the defendant in trust for the use and benefit of the plaintiffs. It was further adjudged that the defendant should convey to the plaintiffs, by good and sufficient deed, whatever of title he might have acquired under and by virtue of the patent, free and clear of any and all incumbrance, within ten days from the filing of the decree, and the master was authorized to make the conveyance in the event of his failure or refusal so to do; and the title of the plaintiffs to the land was declared to be forever quieted as against the defendant. *Hawley* v. *Diller*, 75 Fed. Rep. 946.

The defendant appealed and the decree of the Circuit Court was reversed with directions to dismiss the bill with costs to the defendant—Judge Hawley delivering the opinion of the

Circuit Court of Appeals. *Diller* v. *Hawley*, 48 U. S. App. 462. From that decree the plaintiffs have appealed to this court.

As shown by the above statement of the provisions of the act of June 3, 1878, 20 Stat. 89, c. 151, known as the Timber and Stone Act, a purchaser of the surveyed public lands in California, Nevada, Oregon and Washington, valuable chiefly for timber but unfit for cultivation, or valuable chiefly for stone, was required in his sworn application to state that he did not seek to purchase the same on speculation but in good faith to appropriate it to his own exclusive use and benefit, and that he had not, directly or indirectly, made any agreement or contract with any person or persons by which the title he might acquire from the United States should inure in whole or in part to the benefit of any person except himself; and if the applicant swore falsely in the premises, he became liable to the penalties of perjury, and would forfeit the money he paid for the lands; and all right and title to the same and any grant or conveyance he may have made, "except in the hands of *bona fide* purchasers," would be null and void.

Who, within the meaning of the act, are to be deemed *bona fide* purchasers? Could the appellants, against whom, in respect of these lands, no charge of fraud was made, be deemed *bona fide* purchasers, if it appeared to the Land Department, before a patent issued, that the original entryman made the application to purchase "on speculation" and not in good faith to appropriate the lands to his own exclusive use and benefit?

The words "*bona fide* purchasers," as applied to purchasers of public lands, did not appear for the first time in the Timber and Stone Act of 1878. The first section of the act of June 22, 1838, granting preëmption rights to settlers on the public lands, contains substantially the same provisions as to the effect of a false oath by the applicant and the same saving for the benefit of *bona fide* purchasers. 5 Stat. 251, c. 99. Like provisions were made in the act of September 4, 1841, appropriating the proceeds of the sales of the public lands and granting preëmption rights. 5 Stat. 453, 456, c. 16, § 13. And the provisions of the last act were preserved in section 2262 of the Revised Statutes.

Opinion of the Court.

The contention of appellants is that as between themselves and the United States they must be deemed to have been *bona fide* purchasers from the moment they bought in good faith from Bailey, the vendee of Hackley, (although no patent had been issued,) and that, under the act, they could not be affected by the fraud of the original entryman or his assignee.

While the mere words of the act of Congress furnish some ground for this contention, the interpretation suggested cannot be approved. In *Root* v. *Shields*, 1 Wool. 340, 348, 363, Mr. Justice Miller had occasion to consider who were to be regarded as *bona fide* purchasers under the preëmption laws when no patent had been issued by the United States. He said: "It is further insisted on behalf of the defendants that they are *bona fide* purchasers, and that they, as such, are entitled to the protection of the court. I think it pretty clear that some at least of these defendants purchased and paid their money without any knowledge in fact of any defect in the title. Yet they are not *bona fide* purchasers, for a valuable consideration, without notice, in the sense in which the terms are employed in courts of equity. And this for several reasons. They all purchased before the issue of the patent. The more meritorious purchased after the entry had been assailed and decided against by the land office. But that is a circumstance not material to this consideration. Until the issue of the patent the legal title remained in the United States. Had his entry been valid, Shields would have taken only an equity. His grantees took only an equity. They did not acquire the legal title. And in order to establish in himself the character of a *bona fide* purchaser, so as to be entitled to the protection of chancery, a party must show that, in his purchase and by the conveyance to him, he acquired the legal title. If he have but an equity, it is overreached by the better equity of his adversary."

The rule thus laid down was followed by Secretary Teller in *Cogswell's Case*, 3 L. D. 23, 28. In *Chrisinger's Case*, 4 L. D. 347, 349, Secretary Lamar said: "It is insisted by counsel, and ably argued at length, that the assignees of Chrisinger, being *bona fide* purchasers after entry, are entitled to intervene and have their interests protected as they took without notice of

any defect in the final proof. This proposition is not tenable. It involves the principle that although the claim for title while in the hands of the entryman is worthless, on account of his failure to comply with the law, such claim may be strengthened and made a matter of absolute right by virtue of a transfer to an innocent purchaser. The converse of this, however, is true. Conceding the right of sale after the issuance of final certificate and prior to patent, the purchaser takes no better claim for title than the entryman has to confer, and whatever right is thus acquired is subject to the subsequent action of the Land Department. *Myers* v. *Croft*, 13 Wall. 291; *Margaret Kissack*, 2 C. L. L. 421. Again, the Department must deal directly with its own vendees, with the persons with whom it contracts. It cannot undertake to follow the transfers of the grantees, and to settle questions that may arise upon such transfers, but must leave such matter for determination in the courts."

So in *Smith* v. *Custer*, 8 L. D. 269, 278, Secretary Vilas said: "The preëmption purchaser takes by his final proofs and payment, and his certificate of purchase, only a right to a patent for the public lands in case the facts shall be found by the General Land Office and the Interior Department upon appeal to warrant the issuance of it. Whatever claim to patent he possesses by virtue of his payment and certificate is dependent upon the action of the Department and its future finding of the existence of the conditions, and his compliance in fact with the prerequisites, prescribed by law to the rightful acquisition of the public land he claims. This being so, it is plain that the purchaser can acquire from the entryman no greater estate or right than the entryman possesses. The purchaser is chargeable with knowledge of the law, which includes knowledge of this law; and is chargeable with knowledge of the state of the title which he buys, in so far, at least, as that the legal title remains in the United States, subject to the necessary inquiry and determination by the land office and Department upon which a patent may issue. He is not then an 'innocent purchaser,' so far as there may exist reasons why that patent should not issue. He buys subject to the risk of the consequences of the inquiry depending in the Department. He buys a title *sub judice*. At

the most, it is but an equitable title, the legal title being in the Government. It is a familiar rule that the purchaser of an equitable title takes and holds it subject to all equities upon it in the hands of the vendor, and has no better standing than he. *Boone* v. *Chiles*, 10 Pet. 177; *Root* v. *Shields*, 1 Woolworth, 340."

These principles were applied by the Land Department in *Travelers' Insurance Co.*, 9 L. D. 316, 320, 321.

Again, in *United States* v. *Allard*, 14 L. D. 392, 405, 406, the question was fully examined by Secretary Noble in the light of the authorities, and his conclusion was thus stated: "A *bona fide* purchaser of land is one who is the purchaser of the legal title, or estate; and a purchaser of a mere equity is not embraced in the definition. *Boone* v. *Chiles*, 10 Pet. 177; 3 Op. Attys. Gen. 664. This was the well-defined meaning of the term long before the enactment of the statute under consideration, and, under a well-established rule of construction, unless it is apparent that Congress intended it to have a different meaning, it is to be presumed to have been used in its technical sense. There is nothing in the present statute to indicate that Congress used the term in other than its technical sense. Indeed, it may properly be considered as having attained a technical meaning as used by Congress in previous legislation relating to the disposal of the public lands. As long ago as 1841, Attorney General Legare, (3 Op. Attys. Gen. *supra*,) in considering a case which arose under the preëmption act of 1838, 1 Lester, 49, involving the use of the term in that act, and the right of an assignee of a preëmption claimant thereunder, held: 'The assignee took only an equity, and he took it, of course, subject to all prior equities. The patent, it is needless to say, is the only complete legal title under our land laws. But to protect a purchaser under the plea of a purchase for a valuable consideration, without notice, he must have a complete legal title.'" After referring to *Root* v. *Shields*, above cited, the Secretary concluded: "It thus appears that prior to the passage of the act under consideration (June 3, 1878) it had been determined, both by executive construction and judicial interpretation, that the term '*bona fide* purchaser,' as used in the preëmption law, was so used in its technical sense, or with reference to its pre-

viously known and well-defined legal import. It is therefore to be presumed, nothing appearing to the contrary, that Congress, in making use of the term in the Timber and Stone Act, did so in the light of such construction, and must have intended its use in the same sense as in the preëmption law, namely, that to be a *bona fide* purchaser within the protection of the statute, a party must have acquired by his purchase and the conveyance to him a complete legal title." See also *Whitaker* v. *So. Pac. R. R. Co.*, 2 Copp's Public Lands (1882 ed.), 919, 923; *Stout* v. *Hyatt*, 13 Kansas, 232, 243, 244; *Taylor* v. *Weston*, 77 California, 534, 540.

We are of opinion that the rule announced in *Root* v. *Shields*, above cited, and which has been steadily followed in the Land Department, is consistent with the words of the statute. If any doubt existed on the subject, the construction so long recognized by the Interior Department in its administration of the public lands should be not overthrown, unless a different one is plainly required—as it is not—by the words of the act. *United States* v. *Philbrick*, 120 U. S. 52, 59; *United States* v. *Johnston*, 124 U. S. 236, 253; *United States* v. *Alabama Great Southern R. R. Co.*, 142 U. S. 615, 621.

The contention of appellants that they could not be affected by the fraud, if any, committed by the original entryman or his vendee being unsound, is there any other ground upon which the court can hold that the title to these lands is held by the appellee in trust for them?

It is contended that the Land Department was without jurisdiction to cancel the original entry. The exclusion of mere speculators from purchasing the public lands referred to in the Timber and Stone Act would be of no practical value if it were true that one having purchased in good faith from an entryman who is proved to have sworn falsely in his application, could demand, of right, that a patent be issued to him. The Land Department has authority, at any time before a patent is issued, to inquire whether the original entry was in conformity with the act of Congress. *Knight* v. *United States Land Association*, 142 U. S. 161, and *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 593, and authorities cited in each case. Of course, that

Department could not arbitrarily destroy the equitable title acquired by the entryman and held by him or his assignee. Those who hold such title have a right to be notified of and heard in any proceeding instituted in the Land Department having for its object the cancellation of the entry upon which the equitable title depends. In the present case the appellants had full notice of the proceedings before the register and receiver and before the Commissioner of the General Land Office, which resulted in the cancellation of the original entry. And we infer from the record that they had notice of the order of the Secretary of the Interior directing the papers to be sent to him for examination. The plea, referring to the action of the Commissioner of the General Land Office and of the Secretary of the Interior, distinctly stated that Hackley "was given every opportunity to be heard before the said officers of the Land Department of the United States, likewise his said transferees, before said certificate was canceled." The allegation in the bill on this point means only that the order of the Secretary of the Interior to send the papers to him was made without notice to Hackley and his transferees. But that is immaterial if they had an opportunity to be heard before the Secretary while the case was in his hands. In the summary of the points relied upon by appellants, it is not claimed that they had no such opportunity. The order of cancellation by the Secretary was based upon the fact, which he ascertained from the evidence, that the original entry of the land in dispute was not in good faith for the exclusive benefit and use of the entryman but for the speculative purposes of others with whom the entryman was in collusion.

It is suggested that the order of the Land Department cancelling the entry was based upon a misconstruction of the law. If it had been, then the error committed could be corrected by the courts; for, as said in *Sanford* v. *Sanford*, 139 U. S. 642, 647, where the matters determined by the Land Office "are not properly before the Department, or its conclusions have been reached from a misconstruction by its officers of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been con-

ceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected." See also *Quinby* v. *Conlan*, 104 U. S. 420, 426; *Baldwin* v. *Stark*, 107 U. S. 463, 465; *Cornelius* v. *Kessel*, 128 U. S. 456, 461. But there was no misconstruction of the law by the Land Department. Upon the facts found, no other conclusion could properly be reached than the one indicated by the opinion of the Secretary of the Interior, *United States* v. *Bailey*, 17 L. D. 468, namely, that the original entry of the land was in violation of the act of Congress.

We are of opinion that the result of the decisions of this court was correctly stated by Judge Hawley, when speaking for the United States Circuit Court of Appeals, in *American Mortgage Co.* v. *Hopper*, 29 U. S. App. 12, 17, he said: "(1) That the Land Department of the Government has the power and authority to cancel and annul an entry of public land when its officers are convinced, upon a proper showing, that the same was fraudulently made; (2) that an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and applied for the same, and in all respects complied with the requirements of the law; (3) that the Land Department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee; and (4) that redress can always be had in the courts where the officers of the Land Department have withheld from a preëmptioner his rights, where they have misconstrued the law, or where any fraud or deception has been practiced which affected their judgment and decision."

One other question remains to be considered. The appellants insist that the order of the Secretary of the Interior cancelling the entry of these lands could be of no legal effect without being approved by the Attorney General. This question is one of no little importance in the administration of the public lands. It has never been directly determined by this court.

The sections of the Revised Statutes upon the construction of which this question depends are the following: "§ 2450. The

Commissioner of the General Land Office is authorized to decide upon principles of equity and justice, as recognized in the courts of equity, and in accordance with regulations to be settled by the Secretary of the [*Treasury,*] [Interior] the Attorney General, and the Commissioner, conjointly, consistently with such principles, all cases of suspended entries of public lands and of suspended preëmption land claims, and to adjudge in what cases patents shall issue upon the same. § 2451. Every such adjudication shall be approved by the Secretary of the [*Treasury*] [Interior] and the Attorney General, acting as a board; and shall operate only to divest the United States of the title of the lands embraced thereby, without prejudice to the rights of conflicting claimants. § 2452. The Commissioner is directed to report to Congress at the first session after any such adjudications have been made a list of the same under the classes prescribed by law, with a statement of the principles upon which each class was determined. § 2453. The Commissioner shall arrange his decisions into two classes, the first class to embrace all such cases of equity as may be finally confirmed by the board, and the second class to embrace all such cases as the board reject and decide to be invalid. § 2454. For all lands covered by claims which are placed in the first class, patents shall issue to the claimants; and all the lands embraced by claims placed in the second class shall, *ipso facto*, revert to, and become part of, the public domain. § 2455. It may be lawful for the Commissioner of the General Land Office to order into market, after due notice, without the formality and expense of a proclamation of the President, all lands of the second class, though theretofore unproclaimed and unoffered, and such other isolated or disconnected tracts or parcels of unoffered lands which, in his judgment, it would be proper to expose to sale in like manner. But public notice of at least thirty days shall be given by the land officers of the district in which such lands may be situated, pursuant to the directions of the Commissioner. § 2456. Where patents have been already issued on entries which are confirmed by the officers who are constituted the board of adjudication, the Commissioner of the General Land Office, upon the cancelling of the outstanding patent, is authorized to issue a new pat-

ent, on such confirmation, to the person who made the entry, his heirs or assigns. § 2457. The preceding provisions, from section 2450 to section 2456, inclusive, shall be applicable to all cases of suspended entries and locations, which have arisen in the General Land Office since the twenty-sixth day of June, 1856, as well as to all cases of a similar kind which may hereafter occur, embracing as well locations under bounty-land warrants as ordinary entries or sales, including homestead entries and preëmption locations or cases; where the law has been substantially complied with, and the error or informality arose from ignorance, accident or mistake which is satisfactorily explained; and where the rights of no other claimant or preemptor are prejudiced, or where there is no adverse claim."

Judge Hanford in the Circuit Court held, as we have seen, that the case in the Land Department after the entry had been suspended should have been adjudicated by the board, composed of the Attorney General, the Secretary of the Interior and the Commissioner of the General Land Office, as provided by sections 2450 and 2451, and that the Secretary of the Interior, without a determination of that board, could not lawfully cancel the entry — citing *Stimson Land Co.* v. *Hollister*, 75 Fed. Rep. 941. The Circuit Court of Appeals said upon this point: "In the numerous decisions of the Supreme Court sustaining the authority of the Commissioner of the General Land Office and of the Secretary of the Interior to affirm, modify or annul the entries of public land made in the local land offices, no reference is made to the provisions of sections 2450 and 2451. Notwithstanding this fact, we are asked to assume that that court must have overlooked these provisions of the statute. We decline to act upon any such presumption."

The legislation embraced in the above sections is the outgrowth of the acts of August 26, 1842, 5 Stat. 534, c. 205; August 3, 1846, 9 Stat. 51, c. 78; July 17, 1848, 9 Stat. 246, c. 101; March 3, 1853, 10 Stat. 258, c. 152, and June 26, 1856, 11 Stat. 22, c. 47. Sections 2450 to 2455, both inclusive, were taken from the act of August 3, 1846, which was confined to "cases of suspended entries *now* existing in said land office;" and the operation of the act was limited to a period of two

years, but its operation was extended to August 3, 1849, by the act of July 17, 1848 and by the act of March 3, 1853, was extended for a term of ten years from March 3, 1853, and made applicable "as well to cases which were inadvertently omitted to be acted on under said act as to those of a like character and description which have arisen between the date of said act and the present time." And the act of June 26, 1856, revived and continued in force the provisions of the acts of August 3, 1846, and March 3, 1853, as to all cases of suspended entries and locations "where the law has been substantially complied with and the error or informality has arisen from ignorance, accident or mistake, and is satisfactorily explained, and where the rights of no other claimant or preëmptor will be prejudiced, or where there is no adverse claim."

The act of June 26, 1856, is reproduced in the Revised Statutes as section 2457.

Thus after June 26, 1856, the statutes relating to the board were not applicable to every case of suspended entry, but to those specially mentioned in the act of that date. As carried into the Revised Statutes the purpose of this legislation is, where the law has been substantially complied with, to authorize the confirmation of entries which otherwise the land officers would be compelled to reject because of errors or informalities which, if satisfactorily explained as arising from ignorance, accident or mistake, would, in the absence of an adverse claim, be excused by the courts, in administering the principles of equity and justice. The purpose of the legislation was not to limit or restrict the general or ordinary jurisdiction of the land officers. It was rather to supplement that jurisdiction by authorizing them to apply the principles of equity, for the purpose of saving from rejection and cancellation a class of entries deemed meritorious by Congress, but which could not be sustained and carried to patent under existing land laws. There was no necessity for legislation authorizing the rejection or cancellation of irregular entries, but legislation was necessary to save such entries from rejection and cancellation when otherwise meritorious.

Primarily the decision and adjudication of suspended entries

is, under sections 2450 and 2451, as theretofore, left with the Commissioner of the General Land Office, except that he is to be guided by the principles of equity and justice, and by the regulations settled by the Secretary of the Interior, the Attorney General and the Commissioner, conjointly. The only question is whether all decisions of the Commissioner upon such suspended entries must be submitted to the Secretary of the Interior and the Attorney General, acting as a board, for approval.

If the matter rested upon section 2450 and the first part of section 2451, it might well be contended that a decision rejecting or cancelling a suspended entry should, equally with a decision sustaining such an entry, be submitted to the board for approval. But the latter part of section 2451 does not sustain that view. It is there declared that "every such adjudication," if approved by the board, "shall operate only to divest the United States of the title of the lands embraced thereby." A decision merely rejecting or cancelling the entry could not, with or without the approval of the board, have the effect of divesting the United States of its title. That effect could only flow from a decision sustaining the entry, and since the effect of a decision by the Commissioner such as is required to be submitted to the board and of an approval thereof by the board, is to divest the United States of its title, it follows that only decisions sustaining irregular entries are required to be submitted to the board for its approval. Decisions rejecting or cancelling such entries have the force and effect otherwise accorded to them by the general land laws, and are subject to the appellate or supervisory authority of the Secretary of the Interior as in other instances.

The reasons for requiring the approval by the Secretary of the Interior and the Attorney General of decisions of the Commissioner sustaining irregular entries, under this exceptional legislation, do not apply to decisions rejecting and cancelling such entries. In the one instance claims to public lands are sustained, although acquired in an irregular manner, while in the other such claims are rejected and the public title preserved.

Hackley's entry of the lands in controversy was not suspended because of any error or informality therein arising from igno-

rance, accident or mistake susceptible of explanation, but because of the charge that the same was unlawfully and speculatively made for the benefit of others and not for his own exclusive use and benefit. The suspension was ordered with a view to an investigation and hearing upon that charge. The decision of the Commissioner sustaining the entry, following this investigation and hearing, was not therefore rendered in pursuance of the special authority conferred upon him by sections 2450 to 2457 of the Revised Statutes, but under the general authority given to him, in respect of the public lands, by sections 441, 453 and 2478 of the Revised Statutes and by the act of June 3, 1878, under which Hackley's entry was made.

We are of opinion that the Commissioner's decision having been made under his general authority, and not under the exceptional authority given by sections 2450 to 2457, was not required to be submitted to the Secretary of the Interior and the Attorney General, acting as a board, for approval, but was subject to the appellate or supervisory authority of the Secretary of the Interior under sections 441, 453 and 2478 of the Revised Statutes. *Knight* v. *United States Land Association*, 142 U. S. 161, 177. It follows that the Secretary of the Interior in reversing the decision of the Commissioner of the General Land Office and in rejecting and cancelling Hackley's entry did not exceed the jurisdiction conferred upon him by law.

The matter determined by the decision of the Secretary was whether Hackley's entry was made in good faith for his own exclusive use and benefit. After notice, investigation and hearing, the Secretary of the Interior determined that question against Hackley. In the absence of a charge that this decision was fraudulently given or obtained—and no such charge is made—the Secretary's determination of this question of fact is conclusive upon the courts. This is established by repeated decisions. And if the charge against Hackley's entry be considered as one of fraud, involving a mixed question of fact and law, still the decision of the Secretary of the Interior cancelling that entry fully states the evidence or facts from which the fraud was held by him to be deducible as a matter of law. Upon an examination of that decision and of the evidence or facts there-

in recited we are not prepared to hold that any error of law was committed by that officer.

This disposes of all the questions in the case that need be noticed, and the decree below is

Affirmed.